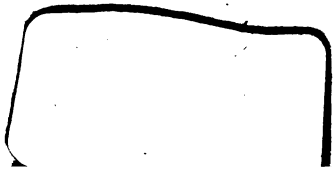
Asa Cottrell



Asa Cottrell

CURIOSITIES 1871

Fred H. Peterson

Oct. 17-16

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AND know, my son, that I would not have thee believe that all which I have said in these books is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learn of my wise masters learned in the law.

LITTLETON.

CURIOSITIES OF THE LAW REPORTERS.

IN the great case, Bartonshill Coal Company *v.* Reid and McGuire,[1] who were both killed in the working of a mine by the negligence of a fellow-servant, employed in the same common work, the reporter quaintly observes: "Reid and McGuire were both victims of the same accident, which, though melancholy, has settled the law."

*

YEAR BOOK, 50 Edw. III. fol. 6, pl. 12. This was a case in which a question arose upon a lady's age; her counsel pressed the court to have her before them, and judge by inspection whether she was within age or not. But "Candish, Justice," showing great knowledge of female character, says: "Ill n'ad nul home en Engleterre que puy adjudge a droit deins age on de plein age; car ascun femes que sont de age de XXX. ans voilent apperer d'age de XVIII ans."

[1] 3 Macqueen, 266, 301 note. Quoted in Gilman *v.* Eastern Railroad Corporation, 10 Allen, p. 237.

"FORMERLY, when a question was raised by government with respect to the right of persons to take water from Portsmouth Harbor, Lord Abinger said: 'An old woman must not take a bucket of water from that harbor, lest a seventy-four should not float.'"[1]

*

BY St. Geo. IV. ch. 71, it is enacted, that "If any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or *other cattle*," such person or persons are made liable to a penalty not exceeding £5, nor less than 10 *s.* In Ex parte Hill,[2] Starkie and Holroyd contended before Bayley J., that the bull was included in the statute under the term "other cattle." Curwood, contra, argued, that it was a rule in the construction of Acts of Parliament, that where there was an enumeration beginning with the lower degrees, and general words embracing others ejusdem generis at the end, these general words did not include a superior degree which was not named in the Act; and he cited the case of the Archbishop of Canterbury,[3] where it was held, on the statute 13 Eliz. ch. 10, which mentions deans and chapters, parsons and vicars, and *all other persons whatsoever having spiritual promotion*, that the words did not

[1] Alderson B. in Embrey *v.* Owen, 15 Jurist, p. 636.
[2] 8 C. & P. 225.
[3] 2 Rep. 46.

extend to bishops, a superior order, who were not named therein; and he contended, therefore, that as, in the statute in question, the enumeration began with ox, cow, and heifer, omitting bull, and concluded with other cattle, it did not include a bull, the bull and the bishop standing in pari statu with reference to the words of those statutes respectively.

⁂

BARON SNIGGE, with reference to the distinction between the actions of trespass and trespass on the case, thus defines the duty of the pleader: "An action of trespass lieth generally, but in an action on the case he ought to hit the bird in the eye." [1]

⁂

IN March on Slander, A. D. 1648, it is said, with reference to the encouragement of actions of slander, "Though the tongues of men be set on fire, I know no reason wherefore the law should be used as bellows to blow the coals."

⁂

THE Star Chamber decided that they might punish the undue preparation of witnesses, though their testimony be true.[2]

[1] Levison v. Kirk, Lane, 67. [2] Darcy v. Leigh, Hobart, 324.

MR. JUSTICE CROMPTON recently[1] gave this brief description of Sir John Fenwick's Case:[2] "The House of Commons were unable to impeach Sir John Fenwick of high treason because there was only one witness against him, the other having been spirited away; but they and the Lords passed a bill of attainder to cut off his head on the evidence of one."

※

LORD CAMPBELL mentions that Lord Erskine, when Lord Chancellor, in one of his judgments observed: "Lord Coke considers the word 'lunaticus' as by no means material, classing it with 'amens' and 'demens,' and there is no doubt that the moon has no influence over lunatics; and he notices that Vesey Jun., the reporter, represents this as a point decided by Lord Erskine, and writes this marginal note: 'In cases of lunacy, the notion that the moon has an influence erroneous.'"[3]

※

THE case of Lillcott *v.* Compton, reported by Vernon,[4] merits commendation for the brevity with which the reporter gives the whole case in a single line:—

"Plate shall pass by a devise of household goods."

[1] Regina *v.* Boyes, 1 Best & Smith, p. 324.
[2] 13 Howell State Trials, 538.
[3] Cranmer, Ex parte, 12 Ves. 445, 450.
[4] Vol. II. p. 638. 60 Penn. State Rep. 228.

"REPORTS and Pleas of Assizes at Yorke," by John Clayton, is the title of a very thin duodecimo published in 1651. "If this book," writes Mr. Allibone, "will do all that Mr. Clayton promises for it, we should suppose that our friends the lawyers would insist on its immediate republication." — "You may see here how to avoid a dangerous jury to your client, what evidence best to use for him, how to keep the judge so he overrule you not; so that, if it be not your own fault, — as too often it is for fear of favor, — the client may have his cause so handled as, if he be plaintiff, he may have his right, and if defendant, moderately punished, or recompensed for his vexation; and such pleaders the people need." — Preface.

⁂

CERTAIN rules of evidence which are now considered fundamental, appear to have been altogether unknown in the seventeenth century. In the trial of Mr. Hawkins, a clergyman, for stealing money and a ring from Henry Larimore, in September 1668, Lord Hale admitted evidence to show he had once stolen a pair of boots from a man called Chilton, and that, more than a year before, he had picked the pocket of one Noble. In summing up, Lord Hale said, after referring to the cases of Chilton and Noble: "This, if true, would render the prisoner now at the bar obnoxious to any jury." [1]

[1] 6 Howell State Trials, 935.

SAUNDERS thus concludes his report of the case of the Dean etc. of Windsor *v.* Gover:[1] "Sed non allocatur, For this fault alone judgment was given against the defendant by Twisden, Raynsford, and Morton, Justices (Kelynge, Chief Justice, being absent), who said that the plea in this point was altogether insensible. But I believe their principal reason was, because they would not determine the matter of law."

⁂

FULLER, in "The Worthies," A. D. 1662,[2] writes of Statham's Abridgment: "The first and last time that I opened this author I lighted on this passage: 'Molendinarius de Matlock tollavit bis, eò quòd ipse audivit rectorem de eàdem villà dicere in Dominicà Ram. Palm. Tolle, tolle';[3] the miller of Matlock took toll twice, because he heard the rector of the parish read on Palm Sunday Tolle, tolle: i. e. 'Crucify him, crucify him.' But if this be the fruit of Latin service, to encourage men in felony, let ours be read in plain English."

⁂

THE statute 1 Edw. II. enacts that a prisoner who breaks prison is guilty of felony; but if the prison be on fire, this is not so, "for he is not to be hanged because he would not stay to be burnt."[4]

[1] 2 Saund. 305 c. 6th ed.
[2] Vol. I. p. 371, ed. 1841.
[3] Tit. Toll, last case of the title.
[4] Plowden, 13.

STYLE, the reporter, from his own account,[1] would seem to have been careful about what he put into his book as decided. In one case,[2] after mentioning that Chief Justice Glyn "argued long, much to the same effect as formerly," he apologizes for not giving his argument, by saying that, "having taken cold," he could not "distinctly hear him." He does not, however, make any excuse in the case of Weld *v.* Rumney,[3] where he reports an argument as made by Twisden, at the Bar, in 1650, which Twisden himself, when on the Bench, about twenty years afterwards, said, was "not one word of it true."[4]

⁂

SIR CRESSWELL LEVINZ, Attorney-General of Charles II., gave an opinion, as law officer of the Crown, upon the mode of trying the question whether certain imported "earthenwares be painted or not"; and the granting of a monopoly for "a new invention of making black pepper white."[5]

⁂

MANY years ago the Court of Common Pleas refused to hear an affidavit read, because the barrister therein named had not the addition "esquire" to his name.[6]

[1] Style, 470.
[2] The Protector *v.* Buckner, Style, p. 470.
[3] Style, 318.
[4] 1 Mod. 296.
[5] 2 Chalmers's Opinions, 284, 320.
[6] 1 Wilson, 245.

IT is recorded of the saints of the Republic, that, in reciting the Lord's Prayer, they would never say "Thy kingdom come," but always "Thy commonwealth come." From a similar spirit, probably, though with better sense, the Court of King's Bench was styled during the time of Style's and Aleyn's Reports the Upper, or Public Bench.[1]

⁂

"ACCORDING to the best English writers," said Baron Alderson,[2] "the word 'inventory' includes a description of a person as well as of those parts of his dress or other matters which are particularly specified. Thus Shakespeare speaks of a lady being inventoried: 'I will give out divers schedules of my beauty: it shall be inventoried, and every particle and utensil labelled to my will.'" [3]

⁂

IN "The Epistle to the Reader," the editor of Goldsborough, in 1653, while language was yet more nervous than polite, says: "For thy further satisfaction know, that thou hast not here a deformed brat, falsely fathered upon the name of a dead man, — too usual a trick played by the subtile gamester of this serpentine age."

[1] For this passage, I am indebted to Mr. Wallace. The Reporters, 200, 3d ed.

[2] Taylor *v.* Bullen, 5 Exch. p. 786.

[3] Twelfth Night. Act I. Scene 5.

IN a recent case in the House of Lords,[1] counsel argued thus: "It is difficult to suppose any species of profits which the phrase 'certain and uncertain profits' would not comprehend. Like Sinclair's well-known division of sleeping into two sorts, namely, sleeping with or sleeping without a nightcap, it would seem to exhaust the subject."

⁂

IN 1835 David Gibbons, "Esquire of the Middle Temple, Special Pleader," published "A Treatise on the Law of Limitation and Prescription." This is the motto on his title-page: —

> "My Galli-gaskins, that have long withstood
> The winter's fury, and encroaching frosts
> By TIME subdued (what will not Time subdue?)"
> J. PHILLIPS'S *Splendid Shilling.*

⁂

LORD ELLENBOROUGH was puzzled to decide whether the letter "s" was a fatal variance in this case: A declaration alleged that the defendants, a partnership firm, made a bill of exchange, "their own *hands* being thereto subscribed." The difficulty was that the word "hand" was in the plural. But he refused to nonsuit.[2]

[1] Repton *v.* Hodgson, 3 House of Lords Cases, p. 79.
[2] Jones *v.* Mars, 2 Campb. 305.

WHEN Littleton prayed judgment in a quare impedit, Year Book, Mich. 35. Hen. VI., Prisot, Chief Justice, protested: "I marvel mightily that you are so hasty in this matter; for it is a weighty matter; and I have seen similar matters pending for twelve years; and this matter has been pending only three quarters of a year."

⁂

TO his report of the case of Wheatley *v.* Lane,[1] Saunders appends this characteristic "note": "It was argued twice, and much debated, and I believe is now settled: but the conveniences or inconveniences which may follow are not yet known."

⁂

IN the Liber Assissarum, p. 177, is a case in which Thomas de Setone, one of the judges of the Common Pleas, in 30 Edw. III. recovered damages from a woman for calling him "traitor, felon, and robber" in the public court.

⁂

IN a case in 4 Leonard, 198, "a point of law is agreed by the court, and affirmed by the clarks."[2]

[1] 1 Saund. 219.

[2] Compare Bacon, Essay LVI. "Of Judicature": "An ancient clerk, skilful in precedents, wary in proceedings, and understanding in the business of the court, is an excellent finger of a court; and doth many times point the way to the judge himself."

PLOWDEN says the reporters deliberated upon doubtful resolutions. If the progeny were rickety, or likely to prove mischievous, they smothered it. It is matter of regret that a similar course is not pursued by the reporters of the present day. If it were, the "books of Reports" would be materially reduced in size.

⁂

THE judgment in a very recent leading case[1] in the Court of Exchequer Chamber concludes thus tersely: "In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and, so far as it rests on principle, fails in reason."

⁂

A widow shall have house-room, and meat, and drink in common for forty days; but she may not kill a bullock within those forty days after the death of her husband, in which time her dower ought to be assigned her.[2]

⁂

ACCORDING to Bracton's description of arson, this crime was committed "when any one from turbulent sedition wickedly and feloniously made a conflagration."[3]

[1] Redhead *v.* Midland Railway Company. 9 Best & Smith, 538.
[2] Noy Maxims, 27.
[3] Ch. XXIV. fol. 14.

THERE is a celebrated passage from one of Lord Plunket's speeches, relative to the Statutes of Limitation. "If time," says his lordship, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the law-giver has placed an hourglass, by which he metes out incessantly those portions of duration which render needless the evidence that he has swept away." This passage has been variously rendered in different publications. In the case of Malone *v.* O'Connor,[1] Chancellor Napier cited it as follows: "Time, with the one hand, mows down the muniments of our titles; with the other, he metes out the portions of duration which render these muniments no longer necessary." This version is probably more accurate than any other, as it was furnished to the Chancellor by one of the counsel in the quare impedit, on the trial of which Lord Plunket made use of the imagery in his address to the jury.[2]

*

FEAR, fraud, and flattery: three unfit accidents to be at the making of a will.[3]

[1] Drury Cases in Chanc. Temp. Napier, 644.

[2] "Statesmen of the Time of George III." by Lord Brougham, 3d Series, p. 227 note. 1 Taylor Ev. § 67, 5th ed.

[3] Noy Maxims, 97.

HAWKSHEAD, in his Essay on Wills, p. 335, relates this case: "I was once in the court of King's Bench, when one of the counsel was making a motion upon an affidavit filled with matters of account and calculations of figures, which he was detailing to the judges, who rose, and one of them said (interrupting him), This court does not sit here as accountants; and they retired."

⁂

LORD TENTERDEN C. J. refused an amendment of a variance which, according to the marginal note of the reporter, "would not have occurred if common care had been taken in the drawing of the declaration;" [1] thus sacrificing the suitor for the sake of punishing the attorney.

⁂

IN Croke Temp. Eliz. is this case: A poor man found a priest too familiar with his wife, and because he spake it abroad and could not prove it, the priest sued him for defamation.

⁂

A FAMILIAR maxim is thus tersely expressed: "He that hath committed iniquity shall not have equity." [2]

[1] Jelf v. Oriel, 4 C. & P. 22.

[2] Francis Maxims, 5.

FROM the rare and interesting volume entitled "Choyce Cases in Chancery," ed. 1672, we print a few of the "Choyce Cases." As an exhibition of Elizabethan habits, manners, and peculiarities, they are quite instructive.

⁂

COSTS against the clerk for mistaking the subpœna. The defendant was dismissed for want of a bill, and forty shillings given him; whereupon he bespake the subpœna for costs, and Robert Bailes, clerk, made the subpœna ad comparend., which being served, the other appeared and got costs, both which costs were discharged, and ordered that the plaintiff may have a subpœna against the said clerk, Robert Bailes, for the costs. Fairbanck, plaintiff. Domina Metham, defendant. Anno 21 et 22 Eliz.[1]

⁂

MANTEL, one of the defendants, maketh oath that his wife hath a young child sucking upon her, without whom he cannot directly answer. And that the other defendant is an infant under the age of twenty-one years. Therefore they are respited for answer until Trinity Term next.[2]

⁂

SUTTON, plaintiff, Eringto, defendant, a suit upon a promise, and twelve pence accepted in consideration, referred to the common law.[3]

[1] Choyce Cases, p. 133. [2] Ibid. p. 120. [3] Ibid. p. 140.

PARISHIONERS sue their parson at every year's end to give a rye loaf and a red herring. The suit was on behalf of the parishioners, *as well rich as poor,* for and concerning the yearly alms or distribution supposed to be due, by the parson of the said parish, of a rye loaf and a red herring to every parishioner on St. Andrew's Eve. But that it appears by a record in the Exchequer, setting down the value of the said parsonage, that there is 13*s.* 4*d.* yearly to be distributed in victuals at the same time to *the poor* of that parish, but not to the *gentlemen and men of ability.* And for that the defendant offered to give yearly 26*s.* 8*d.* in lieu of the said 13*s.* 4*d.* to the poor of the said parish, who stand in need thereof, therefore day is given to the plaintiffs to show cause why they should not accept thereof, or be dismissed. And after assent 40*s.* a year was decreed yearly to the poor. Elmer and Smith, Church-wardens of Northwould in the County of Norfolk, plaintiffs; Scot, parson, of the same town, defendant. Anno 24 Eliz.[1]

* * *

THE plaintiff put in a replication of two skins of parchment of frivolous matter, and not fit to to be rejoined unto, of purpose to put the defendant to unnecessary charges, and therefore Master Godfry, being of counsel with the defendants, desired his client might not be compelled to put in a rejoinder, but that they may go to commission with the same, and ordered accordingly.[2]

[1] Choyce Cases in Chancery, p. 155. [2] Ibid. p. 157.

THE sheriff upon an attachment returned cepi corpus et languidus in prisona. Whereupon a duces tecum was awarded; and thereupon the sheriff returned adhuc languidus. Forasmuch as Walter Williams made an oath that the defendant neither at the time of the return, nor now, is so sick but that he goeth abroad, therefore the sheriff is amerced five pounds for his false return.[1]

⁂

LORD CAMPBELL in his "Life of Lord Lyndhurst," thus relates how a case in the House of Lords, involving an important question, was decided: "In the case of Johnstone *v.* Beattie,[2] a great difficulty arose from our being equally divided, and a fifth law lord, who did not usually attend the hearing in appeals, was called in to make a majority. A domiciled Scotchman, of large landed estate in Scotland, without any property in England, married to a Scotch woman, had by her an only child, a daughter, for whom, before his death, he duly appointed tutors and curators, domiciled in Scotland, who were confirmed by the Supreme Court in Scotland, and who by the law of Scotland were entitled to the guardianship of her person and the management of her property. Some years after the death of both parents, she, while still an infant, happened casually to be in England; whereupon certain parties, wishing

[1] Choyce Cases in Chancery, p. 115. [2] 10 Clark & Finnelly, 42.

to obtain possession of her and to supersede the Scotch tutors and curators, who had acted unexceptionably in the guardianship of her person and her property since her father's death, filed a bill in chancery alleging falsely (as was admitted) that she had property in England, and praying that one of them might be appointed her guardian, and that the Scotch tutors and curators should account to the English guardian for all the rents and profits of the Scotch estates. The Vice-Chancellor, the facts being laid before him, made an order to that effect, and this was affirmed by Lord Chancellor Lyndhurst. Upon an appeal to the House of Lords, the order appeared to Lord Brougham and to myself not only absurd, but contrary to the law of England; while Lords Lyndhurst and Cottenham considered the proceeding as a matter quite of course and highly laudable, although they allowed that the person and property of the infant would henceforth be under the control of the English guardian, and that during her minority she would not without his consent be allowed to marry or to return to her native country. Lord Langdale, Master of the Rolls, being called in, after an argument in his hearing, declared himself of the same opinion. *This was a most lamentable, but by no means singular, instance of the narrow-mindedness of English lawyers.* Here three very able men, competent to form a sound conclusion upon any subject to which logical reasoning and common sense are to be applied,

were satisfied with this order, because it is laid down in the books of practice that, as soon as a bill is filed to make an infant a ward of the court, the infant is a ward of the court, and a guardian ought to be appointed, — so that any foreign child, male or female, brought to England for a few weeks or days, with a view to health or education or amusement, may be made a ward of Chancery and imprisoned in England till twenty-one. I did not much wonder at Cottenham and Langdale countenancing such nonsense, as they had never been freed from the trammels of the Equity draughtsman's office in which they learned to draw bills and answers; but when I found that the masculine and enlightened mind of Lyndhurst did not revolt at it, I was filled with astonishment as well as dismay. The truth, I believe, was, that he had committed himself by affirming as Chancellor, more suo, without much considering whether the order appealed from was right or wrong."

※

THE commencement of the preface to the third volume of Modern Reports, p. xiv, is curious:

"GENTLEMEN, — All human laws are natural or civil." "This puts us in mind," says a very recent writer, "of a humorous introduction to death, which we have somewhere read: —

'Death is common to all.
It occurs but once.'"[1]

[1] Woolrych Lives of Eminent Serjeants, Vol. I. p. 97 note.

IT seems that counsel had been assigned to *advise* with Algernon Sidney, although they were not allowed to address the court. When Bamfield, one of these, rose as amicus curiæ, and suggested in arrest of judgment that there was a material defect in the indictment, the Lord Chief Justice blandly observed, "We have heard of it already; we thank you for your friendship, and are satisfied." He then proceeded to pass sentence of death upon the prisoner.[1]

⁂

THE royal fish are whales and sturgeons, which, when either cast ashore or caught near the coast, belong to the Crown. Blackstone notices a curious distinction made by the old legal authorities, which is that the whale is to be divided between the King and the Queen, the King taking the head and the Queen the tail; the reason assigned being, that the Queen might have the whalebone for her wardrobe, although in fact the whalebone is found in the head, and not in the tail.[2]

⁂

IN Tremaine's "Placita Coronæ," p. 261, is a precedent of an indictment against a counsellor, for betraying his client's cause and taking fees of the other side.

[1] 9 Howell State Trials, 901.

[2] Forsyth Constitutional Law, 178.

IN his judgment in Moens *v.* Heyworth,[1] Baron Alderson observed: "I consider that if a person makes a representation, or takes an oath, of that which is true, if he intend that the party to whom the representation is made, should not believe it to be true, that is a false representation; and so he who takes an oath in one sense knowing it to be administered to him in another, takes it falsely. This may be illustrated by an anecdote of a very eminent ambassador, Sir Henry Wotton, who, when he was asked what advice he would give to a young diplomatist going to a foreign court, said, 'I have found it best always to tell the truth, as they will never believe anything an ambassador says; so you are sure to take them in.' Now Sir Henry Wotton meant that he should tell a lie. This, no doubt, was only said as a witticism, but it illustrates my meaning."

⁂

IN Montriou *v.* Jefferies,[2] Abbott C. J. in summing up said: "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law."

⁂

THERE is an idiom in truth which falsehood never can imitate.[3]

[1] 10 M. & W. 158, 159. [2] 2 C. & P. p. 116.

[3] Lord Chancellor Napier in Low *v.* Holmes, Drury Cases in Chanc. Temp. Napier, 323.

IN Sims *v.* The State,[1] which was an indictment for larceny, the court charged the jury thus: "Gentlemen of the jury, if you believe the evidence, you will find the defendant guilty." To this charge the prisoner very properly excepted. The court then said to the jury: "*Go along, and find the defendant guilty.*" On error the judgment was reversed, the Chief Justice saying, "The remark made to the jury after the charge was given was, to say the least of it, a great violation of judicial propriety, and no doubt had an influence with the jury, that did or might well have prejudiced the prisoner." We think no one will presume to question this conclusion of the learned court.

*

LORD HARDWICKE says[2] that Lord Holt himself took exceptions to the indictment in the case of Rex *v.* Keite,[3] in order to avoid the question whether a venire de novo may issue, in a case of felony, for a defective verdict.[4]

*

LORD HOBART remarked that special demurrers "exist that law may be an art."

[1] 43 Alabama, 23.
[2] Rex *v.* Burridge, 3 P. Wms. p. 499.
[3] Rex *v.* Keite, 1 Ld. Raym. p. 144.
[4] Judgment in Campbell *v.* The Queen, 11 Q. B. p. 889.

MR. JUSTICE HUTTON charged the grand jury at Northampton, with regard to ship-money. Thomas Harrison, a clergyman of that county, foolishly taking umbrage at this charge, and, "while the courts of Common Pleas, King's Bench, and Chancery were sitting, rushed to the bar of the Common Pleas, in the presence and audience of the justices there sitting," and cried out in a loud voice, "I do accuse Mr. Justice Hutton of high treason." He soon suffered for his temerity. He was indicted for the offence, and was fined £5000 and imprisoned, and required to make his submission in all the courts at Westminster. The only point of the case which does not tell to the credit of the judge is, according to his own report,[1] that he also brought an action for damages against Harrison, and recovered £10,000.[2]

※

IN "The Practice Unfolded" of the High Court of Chancery, pp. 31, 32, ed. 1672, are two cases which are models of accuracy and brevity: —

Warwick Hospital contra Feilding, M. 9. Jac., the Lord Chancellor Ellesmere said that churches and hospitals lightly go down by trials in the country, therefore stayed by injunction.

Hill. 9. Jac., Duncumbe contra Randall, 8. Actions at law for one cause. Lord Egerton: This is barratry; stay them all by injunction.

[1] Hutton, 131.

[2] Cro. Car. 503.

LORD RAYMOND thus concludes the report of the case of the Bishop of St. David's *v.* Lucy, which was a case of prohibition clearly within the jurisdiction of the House of Lords: "Note, that Holt, Chief Justice, told me, that if the Lords had been of opinion that the prohibition ought to have been granted, he never would have granted it."[1]

⁂

THE widow shall have all her apparel, her bed, her copher, her chains, borders, and jewels, by the honourable custom of the realm, except her husband unkindly give any of them away. Or be it in debt, that it cannot be paid without her bed, etc., yet she shall have her necessary apparel.[2]

⁂

IT is said that the king can never be nonsuit; and does not appear by his attorney, as other men do, "for in contemplation of law," says Blackstone, "he is always present in court."[3]

⁂

IN Ex parte Davis,[4] the agreement in controversy, which was in the form of a bond, was designated by the Lord Chancellor, Lord Westbury, as "an ingenious piece of mechanism."

[1] 1 Ld. Raym. 545.
[2] Noy Maxims, 108.
[3] Comm. Vol I. p. 270.
[4] 9 Jur. N. S. 859, 861.

THE great sinecure of Chief Clerk of the Court of King's Bench, compensated by a pension of £9000 a year, falling vacant, Sir John Holt granted it to his brother Roland, and the question arose whether the patronage of it belonged to the Chief Justice or the King. This came on to be tried by a trial at bar before the three Puisne Judges and a jury. A chair was placed on the floor of the court for Lord Chief Justice Holt, on which he sat uncovered near his counsel. It was proved that the Chief Justices of the King's Bench had appointed to the office from the earliest times, till a patent was granted irregularly by Charles II. to his natural son, the Duke of Grafton; and there was a verdict against the Crown, which was confirmed, on appeal, by the House of Lords.[1]

⁂

ON the trial of Lord Lovat for treason, Lord Mansfield, Solicitor-General, observed: "There is no calling witnesses without facts; there is no making a defence without innocence; there is no answering evidence which is true."[2]

⁂

SAVILE'S Reports. An accomplished legal bibliographer says that "this book seems to be pretty much in the condition of Pope's 'most women,' and to have 'no character at all.'"

[1] Bridgman *v.* Holt, Shower P. C. 111. Skinner, 354.
[2] 18 Howell State Trials, 812.

IN Wright *v.* Crump,[1] Holt C. J. states the case of the mayor of Hereford, who claimed title to a house in Hereford, where a court was held, *and he by charter was sole judge of the court.* In order to recover the house, he made a lease of it to A., that A. might bring ejectment before him. A. did so, and the mayor, says Lord Holt, "in effect, was judge in his own cause, and he gave judgment for his own lessee"; and upon complaint in this matter, in the King's Bench, the court granted an attachment, and the mayor was laid by the heels;[2] though it is said by one of the reporters, "he got off the easier for that he had been an old cavalier."[3]

⁂

NO wonder that Bacon should have commended "the excellent brevity of the old Scots acts." Here is a specimen, an actual statute at large, comprehensive, and worth a small library of modern statute-books, if it was duly enforced: "Item, it is statute and ordained, that all our Sovereign lord's lieges being under his obeisance, and especially the isles, be ruled by our Sovereign lord's own laws, and the common laws of the realm, and none other laws."

[1] 2 Ld. Raym. 766. 1 Salk. 201. 6 Cush. 332.

[2] To "lay by the heels" was the technical expression for committing to prison. The Chief Justice says to Falstaff: "To punish you *by the heels* would amend the attention of your ears; and I care not if I do become your physician." — *Second Part of King Henry IV.* Act I. Scene 2.

[3] 7 Mod. 1. 7 Mass. 209.

READ *v.* Legard was an action brought for necessaries supplied to the defendant's wife at a time when he was confined in an asylum as a dangerous lunatic. In the course of the argument, Alderson B. inquired of the plaintiff's counsel if they should not apply to the Court of Chancery for relief. They replied: "While the grass is growing, the steed starves; while the Court of Chancery is deciding the cause, the woman might starve." The court decided that the action could be maintained.[1]

⁂

IN the celebrated judgment of Lord Denman in O'Connell *v.* The Queen,[2] is this passage: "If it is possible that such a practice as that which has taken place in the present instance should be allowed to pass without a remedy, trial by jury itself, instead of being a security to persons who are accused, will be *a delusion, a mockery, and a snare.*"

⁂

WHERE a judge omitted, in pronouncing sentence on a conviction for murder, to order that the bodies of the prisoners should be buried within the precincts of the jail, as directed by the statute, it was determined by six judges that the sentence was illegal and the prisoners were discharged.[3]

[1] 15 Jur. 494. See Shaw *v.* Thompson, 16 Pick. 198, 200.

[2] 11 Clark & Finnelly, p. 351.

[3] The Queen *v.* Hartnett, Jebb C. C. 302.

SOUTHOLD brought an action against Daunston for speaking these words: "Southold hath been in bed with Dorchester's wife," whereby he lost his marriage. Serjeant Bing moved unsuccessfully that these words are not actionable; for it may be he was in bed with her when he was a child, she being his nurse, or it may be that her husband was in bed betwixt them; and words shall be taken in mitiori sensu when any construction can be made to help it. "But Jones and myself conceived," says Croke, "that such foreign intendments as have been alleged shall not be taken, but it shall be adjudged ex effectu dicendi, which is here to hinder him of his marriage, as it is now found by the verdict; but they would advise thereof. And it was afterwards adjudged for the plaintiff.[1]

⁂

MR. JUSTICE RICHARDSON, in delivering the opinion in a case[2] relating to justices of the peace, said: "Though I cannot add with the good Prior (speaking of women) —

"'Let all their ways be unconfined,'

yet I will say with him, —

"'Be to their faults a little blind,
And to their virtues very kind.'"[3]

[1] Southold *v.* Dáuŋston, Cro. Car. 269.

[2] Reid *v.* Hood, 2 Nott & McCord, p. 172.

[3] Another reading of this passage which is quoted from "An English Padlock," is this: —

"Be to her virtues very kind;
Be to her faults a little blind."

AN old decision is thus stated by Hon. William M. Evarts:[1] "The Year-Book contains the following story: It seems that somebody had been so rude as to call a clergyman a fool, with a prefixed expletive, which gave point to the stigma wrung from the arsenals of theological denunciation, and not from the technical words of the law. Now, in an action of slander, the point came up distinctly, — for, without special damage proved, we hold such words injurious only when they injure the party spoken of in his profession, — and the court held that it was not actionable, for it did not injure the clergyman in his profession. But the court said that had it been of the lawyer, or of the medical profession, it would have been otherwise. Or, as the old law French more tersely has it, Parce que on peut estre bon parson et grand fou; d'un attorney aliter."

IN Riddle *v.* Welden[2] it was decided that the goods of a boarder are not liable to be distrained for rent due by the keeper of a boarding-house. Chief Justice Gibson, in delivering the opinion of the court, said that Falstaff "speaks with legal precision when he demands, 'Shall I not take mine ease in mine inn?'"

[1] American Law Review, Vol. III. p. 343.
[2] 5 Wharton, 15.

IN a recent case[1] the Court of Queen's Bench were called upon to give a judicial construction to the word "team." In the course of the argument, Mr. Justice Blackburn cited Wordsworth's use of the word: —

> "Yes, let my master fume and fret,
> Here am I, with my horses yet!
> My jolly *Team*, he finds that ye
> Will work for nobody but me."
>
> *The Waggoner*, Canto I.

And also Shakespeare's. He describes Queen Mab as "drawn with a *team* of little atomies."[2] — *Romeo and Juliet.* Act I. Scene 4.

And Mr. Justice Crompton cited the following old epigram: —

> "Giles Jolt, as sleeping in his cart he lay,
> Some waggish pilf'rers stole his *team* away.
> Giles wakes and cries, 'What 's here, odds Dickens! what?
> Why, how now, am I Giles or am I not?
> If he, I 've lost six geldings to my smart;
> If not, odds buddikins! I 've found a cart.'"
>
> *Elegant Extracts*, Vol. IV. p. 296. London, 1791.

And in his judgment he said: "It is not made out to my satisfaction that the word 'team' implies, besides horses, a cart or vehicle of some kind. I think that according to the modern use of the word it does not. Thus you speak of the team a man

[1] Duke of Marlborough *v.* Osborn, 5 Best & Smith, 67 (1864).

[2] It was said at the bar, that "a team of counsel means a number of counsel following one after another."

worked a coach with, and if the word 'team' were confined to lines of animals, a line of pigs would afford a ludicrous instance."

⁂

BY St. Westminster the First, 3 Edw. II. A. D. 1276, the time of memory was limited to the reign of Richard I. July 6, 1189. "And for all practical purposes," said Mr. Justice Wilde,[1] "it might as well be reckoned from the time of the creation." But in 1868 this limitation was practically applied in a well-considered case in the Court of Exchequer Chamber. "The true principle of the law applicable to this question," said Kelly C. B., "is, that when a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary is proved. In this case, the right to these fees may have had a legal origin before the time of memory; and the evidence that they have been taken in modern times, during a period of nearly fifty years, leads to the presumption that they were lawfully taken in the time of Richard I. unless the payment at that time be disproved."[2]

[1] Coolidge *v.* Learned, 8 Pick. p. 508.

[2] Bryant *v.* Foot, Law Rep. 3 Q. B. 497, 505. See the admirable judgment of Mr. Justice Keating, p. 512.

IN 1772 Lord Mansfield decided that there was no property in slaves, and in answer to the plea of the vast property, amounting to millions, at issue on the question, he uttered the memorable maxim: "Fiat Justitia ruat Cœlum."[1] In 1768, in an equally celebrated case, he made use of the same maxim.[2]

Sir Thomas Browne has, in his "Religio Medici,"[3] A. D. 1642, "Ruat cœlum fiat voluntas tua." A recent writer[4] says the phrase used by Lord Mansfield is found in Ward's "Simple Cobbler of Aggawam in America," the first edition of which was printed in 1645.

⁂

IN The Queen *v.* Tutchin,[5] Powys J. and Gould J. having delivered opinions one way, and Powell J. and Holt C. J. the other, the report concludes with this note: "Powys J. recanted instanter, and Gould J. hæsitabat."

⁂

FILOW'S Case, Year-Book, 12 Hen. VIII. 3, pl. 3. Eliot J. went so far in his depreciation of dogs, as to lay down that dogs are vermin, and for that reason the Church would not debase by taking tithes of them.[6]

[1] Somerset's Case, Lofft, p. 17.
[2] The King *v.* Wilkes, 4 Burrow, p. 2562.
[3] Part Second, Sec. XI.
[4] Bartlett. Familiar Quotations, p. 589, 5th ed.
[5] 6 Mod. p. 287.
[6] 1 Smith L. C. 395, 6th London ed.

THIS is a terse description of "The two supream Laws of the Realm," found in "The Practice Unfolded," of the High Court of Chancery, p. 53, ed. 1672: "The Princes of this Land have appointed 2 supream seats of Government within this Land; the one of Justice, wherein nothing but the strict letter of the Law is observed; and the other of Mercy, which in the rigour of the Law is tempered with the sweetness of Equity, the which is nothing but Mercy qualifying the rigour of Justice."

⁂

IN a case in the Year-Book, 38 Edw. III. pl. 14, the House of Lords commanded the Court of Common Pleas to give a judgment. The Chief Justice refused. Afterwards, in his absence, the others complied, and gave judgment. The Court of King's Bench afterwards examined the proceedings of the House of Lords, and adjudged them void.[1]

⁂

IN "The Practice Unfolded" of the High Court of Chancery, ed. 1672, p. 41, is this case: A vexatious plaintiff in forma pauperis, and not able to pay costs upon the dismission, hath been ordered by the Lord Egerton to be whipped, upon the equity of the St. 23 Hen. VIII. cap. 15, and no more to be admitted in forma pauperis.

[1] 12 Mod. p. 65.

YEAR-BOOK, Mich. 10 Hen. VI. fol. 8 b, pl. 30 (A. D. 1431). The Prior of W. brings writ on the Statute of Labourers against a chaplain for not chanting the mass. Strangeways J.: "The writ is not maintainable by the statute; for you cannot *compel a chaplain to sing in mass;* for that at one time he is disposed to sing it, and at another not; wherefore you cannot compel him by the statute." This case was commented on by some of the judges in the celebrated case of Lumley *v.* Gye.[1] The plaintiff, the proprietor of the Queen's Theatre, had contracted with Johanna Wagner, a celebrated opera-singer, to sing in the theatre for a certain time, with a condition that she should not sing elsewhere during the term without the plaintiff's consent in writing. The question was, whether the plaintiff could maintain an action against the proprietor of another theatre, who maliciously procured Miss Wagner to abandon her contract entirely. And a majority of the Court of Queen's Bench held that the action would lie. The judgment was delivered in June 1853. In the previous April the plaintiff filed a bill against Miss Wagner, to restrain her from singing at Gye's theatre.[2] At this time Lord St. Leonards held the Great Seal. His lordship decided that the two positive and negative stipulations in the contract above named constituted only one contract, and that

[1] 2 El. & Bl. 216.

[2] Lumley *v.* Wagner, 1 De Gex, Macnaghten & Gordon, 604, 619.

the court could not enforce performance of the *whole* contract. "It is true," said the astute Chancellor, "that I have not the means of *compelling the lady to sing;* but she has no cause of complaint if I compel her by injunction to abstain from the commission of an act which she has bound herself not to do, and thus, possibly, *compel her to perform her engagement.*"

※

THE rule excluding hearsay evidence, or, rather, the mode in which that rule is frequently misunderstood in courts of justice, is amusingly caricatured by Dickens in his report of the case of Bardell *v.* Pickwick: —

"I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up, if you please, Mr. Weller."

"I mean to speak up, sir," replied Sam. "I am in the service o' that 'ere gen'l'man, and wery good service it is."

"Little to do, and plenty to get, I suppose?" said Sergeant Buzfuz, with jocularity.

"O, quite enough to get, sir, as the soldier said ven they ordered 'im three 'undred and fifty lashes," replied Sam.

"You *must not tell us what the soldier*, or any other man, *said*, sir," interposed the judge; "*it's not evidence.*"

"Wery good, my Lord," replied Sam.

LORD COKE, in his "Fourth Institute," commenting on the jurisdiction and power of justices of the peace, says, "It is such a form of subordinate government for the tranquillity and quiet of the realm as no part of the Christian world hath the like, if the same be duly executed." Shakespeare's picture of a justice of the peace, in the opening scene of "The Merry Wives of Windsor," certainly differs from the office so unduly commended, in language so extravagantly flattering, by the Lord Chief Justice. It has been well said that Shakespeare's picture "is so truthful as to be hardly exaggerated or caricatured. The original of the picture is confined to no age."

*

ACCORDING to the memorandum of a contemporaneous reporter, Mr. Justice Heath refused knighthood, saying, "I am John Heath, Esquire, one of his Majesty's Justices of the Court of Common Bench, and so will die."[1]

*

A CHAIN of authorities Milton calls "a paroxysm of citations."

[1] And Shallow, in answer to Bardolph's inquiry, "Which is Justice Shallow?" answered, "I am Robert Shallow, sir; a poor esquire of this county, and one of the King's justices of the peace." — *Second Part of King Henry IV.* Act III. Scene 2.

IN deciding upon the validity or invalidity of deeds, courts of equity act upon more enlightened principles than courts of law; and whenever it is shown to them that any person by donation derives a benefit under a deed to the prejudice of another person, — and the more especially so, if any confidential or fiduciary relation subsists between the parties, — they so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence, or unconscionable advantage. For example, if a deed of gift, or other disposition of property, be made in favor of a husband by a wife, a court of equity will regard the matter with jealous suspicion, and will either set aside the instrument as conclusively void, or will throw upon the person benefited the burden of establishing, beyond all reasonable doubt, the perfect fairness and honesty of the entire transaction.[1] A grotesque attempt has been made in Ireland to extend this salutary doctrine to a case which assuredly its framers never contemplated. A woman, while living in adultery with a married man, had in the ardor of her affection assigned some of her property to secure a debt which was owing by her paramour. When her passion cooled, her generosity seems to have cooled also; and after the lapse of a short period she had the hardihood to apply

[1] 1 Taylor Ev. § 129.

to the Court of Chancery to set aside her assignment on the ground of undue influence. Her prayer was of course rejected, the court holding that the doctrine on which she relied for relief was only applicable when some lawful relation had been contracted between the parties.[1]

※

IN "The Practice Unfolded" of the High Court of Chancery, p. 5, ed. 1672, is this rule of equity pleading which obtains at the present day:—

"No councellour ought to put his hand to any bill, answer, or other pleading, unless it be drawn, or at least perused by himself in the paper draught, before it be ingrossed, and they are to take care that the same be not stuffed with repetition of deeds, writings, or records in hæc verba; but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief terms, without long and needless traverses of points not traversable, tautoligies, multiplications of words, or other impertinencies, occasioning needless prolixity, that the *ancient* brevity, succintness in bills, and other pleadings may be restored and observed."

And on p. 30 is a rule of practice which *ought* to obtain at the present day:—

"The councel that misinforms the court in his motions, or moves not informing the former order in the

[1] Hargreave *v.* Everard, 6 Irish Eq. Rep. N. S. 278.

cause, hath had his order so misgotten, thereby vacated, and costs awarded to be paid by himself or his client, by himself if it lay in him to have informed himself better, or else by the client who misinformed his councel, and while this course was used little was there of references to consider of the truth of such informations. The councellor in respect of his credit, and the client for fear of such costs, being then careful not to misinform in any thing which they were sure to hear of again by motion of the adverse party to the next motion-day."

※

THE Supreme Court of the United States does not consider "codes" to be the embodiment of true progress; or that "wisdom will die" with those that make them. With reference to the common law of Special Pleading, Mr. Justice Grier observed: "This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to

the court, delaying and impeding the administration of justice."[1] And by way of illustrating the absurdities into which such a course had actually led, the court names a case in which (at the end of a chaos of so-called pleadings) the *jury gave a verdict for* $1,200, *and the court rendered judgment for four negroes.*[2]

⁂

SOMETHING more than the ceremony of marriage was necessary to give the wife a right of dower, by the laws of Normandy. "C'est au coucher que la femme gagne son douaire" — "il faut qu'elle couche avec son mari pour acquérer son douaire c'est ce qui donne la derniere perfection à ce droit."[3]

⁂

IN Noy, 48, a precedent is cited in these words: "The jurors acquitted a prisoner contrary to their evidence, and for that they were fined and imprisoned, and bound for the good behavior of the prisoner during his life."

⁂

IN the index to the last London edition (A. D. 1867) of Smith's Leading Cases, we find this title: "Eagle's Eyes, Court will not always look with."

[1] McFaul *v.* Ramsey, 20 Howard, p. 525. And see the caustic observations of the same acute judge in Farni *v.* Tesson, 1 Black, 315.

[2] Preface to the Fourth Edition of Gould on Pleading.

[3] Flaust, Coutume de Normandie, 528, cited 1 Washburn on Real Property, 197.

ON the danger of admitting presumptive evidence of death, Lord Langdale was in the habit of referring to a very singular case, which happened within his own knowledge while he was on the bench. A sum of money in court was subject to a trust for a particular individual for life, and after his death was to be divided between certain parties. These parties petitioned for payment of the fund to them, on the ground that the individual in question, the tenant for life, was dead. No positive evidence could be adduced of his death; but it was said that his death must be presumed, inasmuch as the evidence showed that he had gone abroad some twenty or thirty years ago, under circumstances of difficulty, and that no human being had heard any tidings of him from that day to this.

This did not satisfy Lord Langdale, and he desired the case to stand over, intimating that if further evidence could be produced to corroborate the already strong presumption, he would attend to it. Additional affidavits were accordingly filed, after the lapse of some time, and the case then appeared so strong that he made the order for division of the fund as prayed. The extraordinary portion of the case remains to be told, — the order, when drawn up according to his lordship's directions, was carried to the proper office to be entered; and the clerk, whose duty it was to enter it, turned out to be the very individual on whose presumed death the order for

payment was made. It seems that in early life he had been involved in scrapes and difficulties, which led him to fly his country, and to keep his residence and career a secret from all his relatives, — that he had returned in time, under a fictitious name, to England, where he at length obtained a situation in the office in question, but without making himself known to any one, — that he was ignorant of his right in the fund in question, and that, but for the remarkable accident just related, he would have been deprived of these rights, and the fund would have been prematurely given over to persons not then entitled to it.

*

ABOUT the year 1554, Henry VIII. manumitted two of his villeins in these words, which are not without their application at the present day: "Whereas God created all men free, but afterwards the laws and customs of nations subjected some under the yoke of servitude, we think it pious and meritorious with God to manumit Henry Knight, a taylor, and Herle, a husbandman, our natives, as being born within the manor of Stoke Clymmysland, in our county of Cornwall, together with all their goods, lands, and chattels acquired or to be acquired, so as the said persons and their issue shall from henceforth by us be free and of free condition." [1]

[1] Barrington on the Statutes, p. 305, 5th ed.

THOUGH evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved.[1] The abuse of this kind of evidence has been a fruitful theme for the satirist; and many amusing illustrations of its effect might be cited from the best authors. Shakespeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, "was by a beggarwoman stolen away," "became a bricklayer when he came to age," and was his father, one of the rioters confirms the story by saying, "Sir, he made a chimney in my father's house, and the *bricks* are alive at this day to testify it; therefore deny it not."[2] Archbishop Whately, who makes use of the above anecdote in his diverting "Historic Doubts relative to

[1] 1 Taylor Ev. § 501.

[2] Part Second of King Henry VI. Act IV. Scene 2.

Napoleon Bonaparte," adds: "Truly this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold." So, in the interesting story of "The Amber Witch," the poor girl charged with witchcraft, after complaining that she was the victim of the sheriff, who wished to do "wantonness with her," added, that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her." To this the sheriff replied, "that it was his little lap-dog, called Below, which had scratched him while he played with it that very morning," and, having *produced the dog*, the court were satisfied with the truth of his explanation.[1]

*

LORD MANSFIELD, while confessing a wish for popularity, added, in words which cannot be too often quoted, "But it is that popularity which follows, not that which is run after; it is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means."[2]

[1] The Amber Witch, translated by Lady Duff Gordon, pp. 78 – 80.

[2] The King *v.* Wilkes, 4 Burrow, 2562.

THE rigid enforcement of the rule regarding professional communications no doubt operates occasionally to the exclusion of truth; but if any law reformer feels inclined to condemn the rule on this ground, he will do well to reflect on the eloquent language of the Lord Justice Knight Bruce, who, while discussing this subject on a recent occasion, felicitously observed: "Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself." [1]

⁂

THERE is no precise rule respecting the degree of intelligence and knowledge which will render a child a competent witness; and in these cases much must ever depend upon the good sense and discretion of the judge. The utter want of discretion in dealing with this subject, which is occasionally evinced by the inferior functionaries of the law, has been admirably ridiculed by Dickens, in his "Bleak House." A little crossing-sweeper being brought up before a

[1] Pearse v. Pearse, 1 De Gex & Smale, 28, 29.

coroner, to give evidence on an inquest, the narrative thus proceeds: "'Name Jo. Nothing else that he knows on. . . . . Knows a broom 's a broom, and knows it 's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what 'll be done to him arter he 's dead. if he tells a lie to the gentlemen, but believes it 'll be something wery bad to punish him, and sarve him right, — and so, he 'll tell the truth.' 'This won't do, gentlemen,' says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive juryman. 'Out of the question,' says the coroner; 'you have heard the boy; *can't exactly say* won't do, you know. We can't take *that* in a court of justice, gentlemen. It 's *terrible depravity.* Put the boy aside.' Boy put aside; to the great edification of the audience, especially of little Swills, the comic vocalist."

⁂

IN case for words which imported the committing of adultery by the plaintiff with Jane at Stile, the defendant in mitigation of damages may give in evidence, that the plaintiff committed adultery with Jane at Stile, but not with any other woman. Per Holt Chief Justice, at Brentwood, Summer Assizes, 13 Will. III.; ruled accordingly.[1]

[1] Smithies *v.* Dr. Harrison, 1 Ld. Raym. 727.

FROM the language used by Lord Raymond in his report of the case of Brewster *v.* Kitchin,[1] it would seem that he had no great respect for the justices who sat with Lord Holt. After mentioning a decisive objection to an action started by the Chief Justice, he says: "But the other three judges seemed to be in a surprise, and not in truth to comprehend this objection; and therefore they persisted in their former opinion, talking of agreements, intent of the party, binding of the land, and I know not what. They gave judgment for the plaintiff, against the opinion of Holt Chief Justice."

*

IN the "Statutes of the Streets," printed in 1598, it is ordered that "no man . . . . shall whistle after the houre of nyne of the clock in the night," or "keep any rule whereby any such suddaine outcry be made in the still of the night, as making an affray or beating his wife or servant," etc.

*

FORTESCUE affirms that "a jury is not, nor can be, bound by any opinion of the House of Commons, nor by any court of law in the world, but that of their own consciences."[2]

[1] 1 Ld. Raym. 322.

[2] De Laud. Leg. Ang. p. 107. Cited in Broom Constitutional Law, p. 868.

HOLT C. J. "If a man solicits a woman and goes gently to work with her at first, and when he finds that will not do he proceeds to force, it is all one continued act, beginning with the insinuation and ending with the force. And this being an attempt and solicitation to incontinency, coupled with force and violence, it does by reason of the force, which is temporal, become a temporal crime in the whole. An indictment will not lie for a plain adultery, but libel in the spiritual will."[1]

※

FROM the journal of a Gloucestershire magistrate, A. D. 1715 to 1756, it appears that Frances Williams, a damsel who, loving well rather than wisely, is necessitated, on the 13th April 1715, to appear before the magistrate, in accordance with the law as it then stood, "to be examined about her great belly." A week subsequently she is again brought before him "touching the aforesaid *felony*."

※

IN a case in the Court of King's Bench, in consequence of the affirmative of the issue being on the defendant, and his beginning, the jury found a verdict for the defendant when they intended to find for the plaintiff. The court refused to grant a new trial.[2]

[1] Rigault *v.* Gallizard, Holt, 51.

[2] Bridgewood *v.* Wynn, 1 Harrison & Wollaston, 574. Bridgewater *v.* Plymouth, 97 Mass. 382, 391.

LORD CAMPBELL, in his Life of Lord Lyndhurst, p. 141, gives the following account of the great case of The Queen, plaintiff in error, *v.* Millis.[1] "The law lords were definitively divided upon the most important question which ever came before the House of Lords as the Supreme Court of Appeal. Unfortunately such a question was decided on the technical maxim by which the House of Lords alone, of all the tribunals I ever read of, is governed, — Semper præsumitur contra negantem, — making the result often depend upon the language in which the questioned is framed.[2] In Ireland, a man who was a member of the Established Church was married to a woman who was a Presbyterian by a regularly officiating Presbyterian clergyman, both parties intending to contract a valid marriage, and believing that they had done so. They lived together some years as man and wife, and had several children, who were acknowledged as legitimate. The husband then married another wife, the former wife being still alive, and was indicted for bigamy. His defence was that the first marriage was a nullity, and therefore that he committed no crime when he married the second wife. Then arose the fearful question, whether by the common law of England there might be a valid marriage by the consent of the parties without the presence of a priest episcopally ordained. For half a cen-

[1] 10 Clark & Finnelly, 534 (1844).

[2] But see Durant *v.* Essex Company, 7 Wallace, p. 113, and Appendix, p. 755.

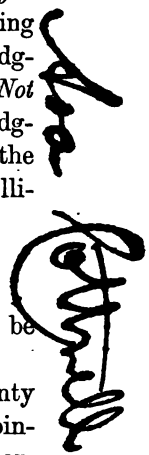
tury, ever since the decision of Lord Stowell, in the famous case of Dalrymple *v.* Dalrymple,[1] it had been considered established doctrine that the presence of an episcopally ordained priest was unnecessary. This doctrine had been expressly approved of by Lord Kenyon, Lord Ellenborough, Lord Tenterden, and all our most eminent Judges, and upon the strength of it there had been repeated convictions for bigamy. But in an obscure book, lately published, professing to state 'The Law of Husband and Wife,'[2] the doctrine was controverted; and upon this doctrine proceeded this prisoner's defence. The Irish Judges were equally divided; and, strange to say, the English Judges, being consulted by the House of Lords, declared themselves unanimously of opinion that the first marriage was null, although they admitted that this was contrary to the Canon Law which prevailed in every other country of Europe before the Council of Trent. They relied chiefly on a supposed Anglo-Saxon law, that, to make nuptials prosperous, 'there must be present a *mass priest.*' Yet they admitted that a marriage celebrated by one in deacon's orders always was and is valid, notwithstanding that a deacon is not a mass priest. Six law lords had been present at the argument, — the Lord Chancellor, Lord Lyndhurst, Lord Abinger, Lord Cottenham, Lord Brougham, Lord Denman, and Lord Campbell. Of these, the

[1] 2 Haggard Cons. Rep. 54 (1811).

[2] Roper on the Law of Husband and Wife, ed. Jacob, 1826.

first three voted for reversing the conviction, and the last three for affirming it.

"If the motion had been that the judgment be affirmed, we, the contents, should have succeeded in establishing the old common law as laid down by Lord Stowell, the *presumption* being against the *negative;* but the Chancellor, according to a standing order of the House, put the question that 'the judgment be reversed,' and we were obliged to say '*Not content,*' the presumption was against us, and a judgment passed by which hundreds of marriages, the validity of which had not been doubted, were nullified, and thousands of children were bastardized."



⁂

LORD COKE says that if a gentlewoman be termed "spinster," she may abate the writ.

An indictment against Alicia S. of D. in the county of S., wife of F. S. *spinster,* etc. is not good; for spinster being an indifferent addition for man or woman, should refer to F. S., which is the next antecedent, and so the woman has no addition.[1]

⁂

IN a recent case Chief Justice Erle observed: "It is certainly an odd sort of an estate, — a fee-simple in a profit à prendre."[2]

[1] Dyer, 46 b. Noy Maxims, 4.

[2] Bailey *v.* Stephens, 12 C. B. N. S. p. 103.

THE following is Lord Langdale's graphic description of Lord Cardigan's celebrated trial: "The House was rather thin of Peers. The case went off in a very absurd way. The indictment was for firing at Harvey *Garnett Phipps* Tuckett, with intent to kill, etc.; but when they came to prove this, there was no witness produced who knew Lieutenant Tuckett by any other name than 'Harvey Tuckett'; and the consequence was that Sir William Follett immediately objected that there was no evidence to sustain the indictment.

"Strangers were therefore ordered to withdraw, and Lord Denman stated that he considered the objection valid, and in this he was supported by Lords Abinger, Brougham, Wynford, etc.; and then, after a little debate whether the House should at once proceed to judgment, it was decided that they would; and the question of 'Guilty, or not Guilty?' being put, Lord Cardigan was immediately acquitted."[1]

※

THERE are very many cases of murder more venial than many cases of manslaughter. A. slaps B. in the face, B. stabs him; this is manslaughter. A. shoots at a fowl, intending to steal it; one grain of shot hits B., who dies of lockjaw a month after; this is murder. The fowl, instead of a hen, is a wild partridge; it is manslaughter. A. B. C. D. and E. are

[1] See Dearsly C. C. 474, 481.

stealing apples; F., the owner of the tree, collars A., who resists. B. C. D. and E. throw stones at him, and the stone thrown by D. kills him; this is murder in all five. A. has reason to think that B. has seduced his wife; runs home, finds some evidence (though not conclusive evidence) of the fact, and stabs B.; this (per Watson B., Regina *v.* Davies, Liverpool Summer Assizes 1857) is "manslaughter of the lowest degree."

※

WHEN the proceedings have been entered upon record, the common-law power of amendment ceases; for the Judges at common law were prohibited from allowing alterations to be made in any record, and indeed several of them were, during the reign of Edward I., severely punished for so doing, among whom the Lord Chief Justice Hengham was fined, according to some seven thousand, to others eight hundred marks, which sum, as we are told by Justice Southcote,[1] was expended in building a clock-house at Westminster, with a clock to be heard in the Hall, — a circumstance which, as is observed by Mr. Justice Coleridge in his admirable edition of Blackstone's Commentaries, explains a dictum of Lord Holt;[2] who, refusing to amend a record, said, "he considered there wanted a clock-house over against the Hall-gate."

[1] 3 Inst. 72. 4 Inst. 255. 1 Hale P. C. 646.
[2] Anon. 6 Mod. 130.

IN North's Life of Lord Keeper Guilford,[1] it is said: "The court, answering the title of Common Pleas, was placed next the hall door, that suitors and their train might readily pass in and out. But the air of the great door, when the wind is in the north, is very cold, and, if it might have been done, the court had been moved a little into a warmer place. It was once proposed to let it in through the wall (to be carried upon arches) into a back room, which they call the Treasury. But the Lord Chief Justice Bridgman would not agree to it, as against Magna Charta, which says that the Common Pleas shall be held in certo loco, or in a certain place, with which the distance of an inch from that place is inconsistent, and all the pleas would be coram non judice. Although, at the same time, others thought that the locus, there, means the villa only; so that the returns being apud Westmonasterium, the court might sit on the other side of the Abbey, and no solecism of jurisdiction happen. But yet that formal reason hindered a useful reform; which makes me think of Erasmus, who, having read somewhat of English law, said that the lawyers were doctissimum genus indoctissimorum hominum."

※

IN 1539 Parliament passed "An Act for abolishing Diversity of Opinions in certain Articles concerning Christian Religion."[2]

[1] Vol. I. p. 199. Manning Serviens ad Legem, 179, 180.

[2] 31 Hen. VIII. ch. 14.

SIR JOHN STRANGE, Solicitor-General, better known in the profession by his Reports, thus records under his own hand his early success and good fortune: "Memorandum. Having received a considerable addition to my fortune, and some degree of ease and retirement being judged proper for my health, I this term (M. T. 16 Geo. II.) resigned my offices of Solicitor-General, King's Counsel, and Recorder of the city of London, and left off my practice at the House of Lords, Council Table, Delegates [now the Judicial Committee of the Privy Council], and all the courts in Westminster Hall, except the King's Bench, and there also at the afternoon sittings. His Majesty (Geo. II.), when at a private audience I took leave of him, expressed himself with the greatest goodness towards me, and honored me with his patent, to take place for life next to his Attorney-General.—Anno ætatis meæ 47."[1]

※

THE king, for prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend against them; and the disobeying a proclamation, when legal, has been said to constitute a substantive offence, for which the offending party may be punished. But said Sir Edward Coke, "I never heard an indictment to conclude contra regiam proclamationem.[2]

[1] 2 Strange, 1176.

[2] 12 Rep. 75.

IN the reign of Elizabeth, actions for slanderous words were of frequent occurrence; and many refined distinctions were resorted to by the Judges. To call a man a cuckold was not an ecclesiastical slander; but wittol was, for it imports his knowledge of and consent to his wife's adultery.[1] Shakespeare noticed this distinction. In "The Merry Wives of Windsor," Act II. Scene 2, Ford exclaims, "Terms names! — Amaimon sounds well; Lucifer, well; Barbason, well; yet they are devil's additions, the names of fiends: but cuckold! *wittol*-cuckold! the devil himself hath not such a name."

※

IN 1824 John Richardson, Esq., published an edition of Branch's Maxims with a translation. The following are specimens of this scholarly performance: Errores scribentis nocere non debent, that is, Clerical errors ought not to vitiate, is translated, "*The mistakes of a man writing ought not to harm.*" Again, the well-known maxim, Omnis nova constitutio futuris temporibus formam imponere debet, non præteritis, which Mr. Broom accurately translates, "A legislative enactment ought to be prospective in its operation, not restrospective," is thus rendered, "*Every new institution should give a form to future times, not to past.*"

[1] Holt C. J. in Smith v. Wood, 2 Salk. 692.

IT has sometimes been supposed that the bench offers but little opportunities for eloquent fancy or polite erudition; how erroneous this opinion is, our readers will see from the following exordium of an opinion delivered by Chief Justice Crozier, in the case of Searle *v.* Adams:[1]—

"In this case, the irrepressible Statute of Limitations is again presented for consideration. For some years past, upon the disposition of each succeeding case involving a construction of this statute, it was considered, by bench and bar, that fiction itself could scarcely conceive of a new question to arise thereunder: but, as term after term rolls around, there are presented new questions, comparing favorably in point of numbers with Falstaff's men in buckram; thus adding to the legions that have gone before a new demonstration of the propriety and verity of the adage, that 'truth is stranger than fiction.' With the heat of ninety-eight degrees of Fahrenheit in the shade, and the newspapers teeming with reports of the ravages of our great common enemy, who, the more effectually to accomplish his double purpose of capturing the imprudent and frightening the timid, has assumed the form of the Asiatic monster, it might be supposed by the unthinking that the consideration of such questions would be entered upon rather reluctantly. But we beg to disabuse the public mind of any such heresy. Cases might be imagined where

[1] 3 Banks, 515, 518.

'smashes' would not stimulate, nor 'cobblers' quicken, nor 'juleps' invigorate; but a new question under our Statute of Limitations, in coolness and restoring power, so far exceeds any and all of these, that, when one is presented, the 'fine ould Irish gintleman's' resurrection under the circumstances detailed in the song becomes as palpable a reality as the 'Topeka Constitution,' or 'the territorial capital at Mineola.' The powers of a galvanic battery upon the vital energies are wholly incomparable to it. So that the consideration of this case upon this day of wilted collars and oily butter should not entitle the court to many eulogies for extraordinary energy in the fulfilment of its duties. . . . . Counsel was understood to intimate that some mischievously disposed persons, with a diabolical intent not clearly revealed, while organized as the legislature of the State, had made a violent and unwarrantable onslaught upon the Constitution,— that Constitution which this court, as a tripedal pier, is exerting its utmost endeavors to support, — that Constitution which, not only from patriotic and moral, but from alimentary considerations as well, we are bound to maintain and defend. Being in a somewhat 'melting mood' to-day, we would be pleased to gratify counsel by adopting his fears," etc.

The learned justice then goes on to decide the case, and concludes that "it is as transparent as the soup of which Oliver Twist implored an additional supply," that the case does not come within the statute.

If the reader desires a further specimen of Judge Crozier's eloquence, we refer him to his remarks in Craft *v.* The State,[1] in defending the somewhat obvious proposition, that a jury is not bound, as matter of law, to disbelieve the evidence of a prostitute; or, to use his own words, that it ought not to be said that a woman "pours out from her heart at Venus's shrine with her virtue every other good quality with which in our thoughts we endow her sex," and this "whether she habitually flaunts her frailty in the face of the world, or attempts to hide it in retiracy, or garnish it with garlands of good works."[2]

*

THE famous judgment of Sancho Panza acquitting the herdsman charged with rape, was founded on the ascertained fact that the prosecutrix successfully resisted the attempt to take her purse, which the accused made by order of the court. "Sister of mine," said honest Sancho, to the forceful but not forced damsel, "had you shown the same, or but half as much courage and resolution in defending your chastity, as you have shown in defending your money, the strength of Hercules could not have violated you."[3] It is matter of curiosity to observe that this is not a fictitious case, but is to be found in Muyart

[1] 3 Banks, 450, 480.

[2] For the above passages from the Kansas Reports, with the comments, I am indebted to The American Law Review, Vol. I. p. 748.

[3] Don Quixote. Part II. bk. 3, ch. 13.

de Vouglans, a learned writer on the Criminal Law of France, p. 498 (4to. Paris, 1757). It is the exact case in which Sancho gave judgment, and his judgment accorded with that of the French judge.

*

IN "The Practice of the High Court of Chancery Unfolded," ed. 1672, we find the following among "Suits denied help in the Chancery, pp. 49, 50":—

Perpetuities of all kinds by assurances, statutes acknowledged, etc. for they fight against God.

A plaintiff making his title by an entail, the Lord Chancellour Egerton dismissed it, saying of the statute De donis conditionalibus, calling it the ambitious statute, let it help him at the law as it may.

Casual morts upon the return from Constantinople, etc.

Play-houses and all houses of iniquity, the court being a court of equity.

Estates derived under concealed titles, the Lord Egerton saying that as the titles began by the rigour of the law, let them so maintain them by the law as they come.

Country awards by the voluntary submission of the parties without any order or reference of court.

A man steals his wife against her friends' assent, and sues for a portion here: Lord Egerton, He that steals flesh let him provide bread how he can.

THE following is a brief extract from a law paper, for the full understanding of which it has to be kept in view that the pleader, being an officer of the law, who has been prevented from executing his warrant by threats, is required, as matter of form, to swear that he was really afraid that the threats would be carried into execution:—

"Farther depones, that the said A. B. said that if deponent did not immediately take himself off he would pitch him (the deponent) down stairs,—which the deponent verily believes he would have done.

"Farther depones, that, time and place aforesaid, the said A. B. said to deponent, 'If you come another step nearer, I 'll kick you to hell,'—which the deponent verily believes he would have done."

THE following is a translation of the first bill ever filed in Chancery:—

"To the very Reverend Father in God the Archbishop of York, Chancellor of England, sheweth Thomas Duke of Gloucester; That, whereas by an inquest taken before the Escheater of our Lord the King in the county of Salop, by writ of diem clausit extremum, after the death of Thomas late Earl of Stafford, it was found by the same inquest that the said late Earl died seised in demesne as of fee, among other lands and tenements in the said county, of a messuage and certain other lands and tenements with

the appurtenances, in the town of Bridgenorth in the said county, the custody of which lands and tenements, among other lands and tenements, which were of the said late Earl, was committed to the said Duke, to have under a certain form, as in the letters patent of our said Lord the King, thereupon made to the said Duke, is more fully contained. And so it is that Thomas Othale, with divers other persons, have entered into the said lands and tenements in the said town, in the possession of our said Lord the King. Wherefore may it please your sage discretion to consider the matter aforesaid, and to grant a writ directed to the said Thomas Othale, for to be before you in Chancery of our said Lord the King at the Octaves of the Trinity next coming, under the penalty of £100, to answer the matters aforesaid, done in contempt of our said Lord the King."[1]

※

IT was decided as early as the reign of Henry V. that a contract imposing a general restraint on trade is void. Hull J. flew into a passion at the sight of a bond imposing such a condition, and exclaimed: "A ma intent vous purres aver demurre sur luy que l'obligation est voide eo que le condition est encounter common ley, *et per Dieu, si le plaintiff fuit icy, il irra al prison tanque il ust fait fine au Roy.*"[2]

[1] A Calendar of Proceedings in Chancery, printed in 1827.

[2] Year-Book, 2 Hen. V. fol. 6, pl. 26.

IN Nash *v.* Battersby,[1] the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was held ill; for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

⁂

ACCORDING to Lord Campbell, in the tenth year of King Henry VII., that very distinguished judge, Lord Hussey, who was Chief Justice of England during four reigns, in a considered judgment delivered the opinion of the whole Court of King's Bench as to the construction to be put upon the words, "As free as tongue can speak or heart can think."[2]

⁂

WHEN the judgment was reversed in the celebrated case of O'Connell *v.* The Queen, according to the opinion of Lord Denman, Lord Cottenham, and Lord Campbell, Lord Brougham, as reported by the authorized reporters of the House of Lords,[3] spoke of it as "a decision which will go forth without authority, and come back without respect."[4]

[1] 2 Ld. Raym. 986. 6 Mod. 80.

[2] Year-Book, 10 Hen. VII. fol. 13, pl. 6.

[3] Clark & Finnelly, Vol. XI. p. 423.

[4] "He was actually in a furious rage," writes Lord Campbell, Life of Lord Brougham, p. 531.

IN Saunders's report of the case of Veale *v.* Warner,[1] after a statement of his argument for the defendant, he proceeds: "And of such opinion was the whole court clearly. But they would not give judgment for the defendant, because they conceived it was a trick in pleading; but they gave the plaintiff leave to discontinue on payment of costs. And Kelynge Chief Justice reprehended Saunders for pleading so subtly on purpose to trick the plaintiff by the omission of the other part of the award. But it was a case of the greatest hardship on the defendant; for the bond of submission was only in the penalty of £2000, and the arbitrators had awarded him to pay £3100, being £1100 more than the real penalty of the bond; when, in truth, there was nothing at all due to the plaintiff, but he was indebted to the defendant."

※

IT is one of the principles of eternal justice, that no one is to be punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard. Justice Foster refers to a very old precedent in support of this doctrine.[2] "I have heard it observed by a very learned man," says he, "that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' says God, 'where art thou?'

[1] 1 Saund. 327, 327 a, 6th ed.

[2] Foster, 202. 1 Strange, 557. Andrews, 176. 2 Ld. Raym. 1334.

Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." In a recent case this passage was cited in his judgment by Mr. Justice Maule.[1]

⁂

IN Birks *v.* Trippet,[2] is the following passage: "And Twisden Justice interrupted Saunders, and said to him, 'What makes you labor so? The court is of your opinion, and the matter clear.'"

The reporter appended the following note to the case of Hayman *v.* Gerrard:[3] "The court said that the replication in this case was well concluded, and as it ought to be: quod mirum videtur; for it seems to me that the replication was bad upon that account, but well enough for the other point." The reporter's wonder is now confirmed.[4]

⁂

THE head note to Blackman *v.* Bainton,[5] is quaint: "Twenty-five witnesses and a horse on one side, against ten witnesses on the other. Held, not such a preponderance of 'inconvenience' as to induce the court to bring back the venue from the place where the cause of action (if any) arose."

[1] Abley *v.* Dale, 10 C. B. 71, 72 (1850).
[2] 1 Saund. 33 b, 6th ed.
[3] 1 Saund. 103, 6th ed.
[4] Thorne *v.* Jenkins, 12 M & W. 614.
[5] 15 C. B. N. S. 432.

THERE is a well-known judgment of Mr. Justice Maule, when a difference of opinion existed among the members of the bench. "I agree," said this caustic judge, "with the conclusions of my brother A., for the reasons offered by my brothers B. and C."

⁂

"SURPLUSAGE," said the same eminent judge, in that happy mode in which he combined wit and wisdom, "is something that is altogether foreign and inapplicable, as if you were to state that a man had a *blue coat on and* did a certain thing; but it is not surplusage to say that the defendant knocked the plaintiff down, and *also* tore his clothes, and *also* put his eye out."[1]

⁂

THE book called Latch's Reports is confessedly but a copy made by Latch from some other book. "Reader!" appeals the editor of Latch, in pompous and lying solemnity, "the testimonials of many sages of the law, the judges, and his contemporaries, give you an assurance, above all I can express, that the original of this impression was all written by that worthy person's own hand." In the preface to Palmer's Reports it is said somewhat snarlingly, that the cases in Latch are reported "corruptly enough."[2]

[1] Aldis *v.* Mason, 11 C. B. 139.

[2] Wallace The Reporters, 190, 3d ed.

IN the "Assizes de Jerusalem" — one of the most curious and important relics of the jurisprudence of the Middle Ages, a compilation made towards the close of the eleventh century — we have a full account of the office, duties, and proper qualifications of a pleader. As a translation of this barbarous dialect may save the reader some trouble, the following very literal one is offered:[1] "Every person about to plead in the Supreme Court ought, before he begins, to pray the lord to appoint him counsel. He ought to pray, for his counsel, the best pleader in the court; and this, whether he is himself a pleader or not; because, in the latter case, he will need counsel to defend his right, and establish his claim or defence; and even in the former, he will do well to have counsel; since there is no pleader so wise, that he may not be often advised, on his pleading, by another pleader; as two pleaders know more than one, etc. He who has counsel, and wishes to make claim on some man or woman present in court, ought to say by his counsel to the lord, so that the other party may hear, Sir, such an one makes, before you, such a claim, and hopes to obtain justice, in that behalf, from you and the court; and then he should say what he claims, and in the shortest way possible, etc. A good pleader ought to have good sense, a sound understanding, and a subtle genius; he should be free from the faults of indecision, timidity, false shame,

[1] Stephen on Pleading, Appendix, p. xiv. 9th Am. ed.

haste, and nonchalance; while he pleads, he should keep his attention from wandering to any other subject, and should also take care to avoid undue heat and asperity." Some of these admonitions seem to deserve the attention of the nineteenth no less than the eleventh century.

⁂

THE old reporters often note the manner of the judges. Godbolt tells us that the "Lord Chancellor, smiling, said"[1] that a case might be doubted. Rolle questions the correctness of an opinion uttered by Coke, since "Haught semble a disallower ceo car il shake son capit at ceo."[2] And Saunders reports a case where a majority of the court gave judgment for the plaintiff, but "Twisden Justice contratotis viribus, and that the action did not lie."[3] In recording the judgments of this somewhat passionate judge, the reporters begin, "Twisden, in furore, observed," etc.[4]

⁂

"THEY [corporations] cannot commit trespass nor be outlawed nor excommunicate, for they have no souls." — 10 Rep. 32 b.[5]

[1] Lord Mountjoy's Case, Godbolt, 18.

[2] Hudson *v.* Barton, 1 Rolle Rep. 189.

[3] Pomfret *v.* Ricroft, 1 Saund. 322.

[4] See Saunders, passim.

[5] Recent cases have decided that an action will lie at the suit of or against a corporation for a libel. Whitfield *v.* Southeastern Railway Company, 27 L. J. Q. B. 229. Metropolitan Saloon Omnibus Company, *v.* Hawkins, 28 L. J. Exch. 201.

OF a recent Act of Parliament, it was remarked by Mr. Justice Maule, "that it was incongruous and impossible of operation, and its absurdities so great that the framers themselves had no very distinct notion of its meaning."[1]

In a very recent case,[2] Blackburn J. observed with respect to an Act passed in 1746: "The statute, though not drawn in modern times, is somewhat obscure."

※

PLOWDEN states this case· If a woman is warden of the Fleet, and one imprisoned in the Fleet marries her, it is an escape in the woman and the law adjudges the prisoner to be at large, for he cannot be lawfully imprisoned but under a keeper, and he cannot be under the custody of his wife, for which reason the law must necessarily adjudge him to be at large.[3]

※

YELVERTON thus concludes his report of a case in which he was of counsel with the defendant: "And therefore the plaintiff, seeing the opinion of the court against him, prayed that he might discontinue the suit. Quod fuit concessum per Fleming Chief Justice, and the other justices would not cross him in it."[4]

[1] Stratton *v.* Pettit, 16 C. B. p. 432.
[2] Regina *v.* Scott, 4 Best & Smith, p. 374.
[3] Comm. 37.
[4] Doughty *v.* Fawn, Yelv. p. 227.

THE present Lord Chief Justice of the Court of Queen's Bench thus discourses of the subtilitas legum: "An amusing instance of this subtilitas is given by Gaius,[1] in the case of a man who brought an action against another, on a law of the Twelve Tables, for cutting down his vines. The plaintiff proved the fact, but he was defeated, or, as we should say, nonsuited, because the law in giving the action had spoken only of cutting down *trees*, and it was held that the plaintiff ought to have followed the words of the law. I take it there is nothing to beat this to be found in Meeson and Welsby. No wonder that Gaius,[2] speaking of the old legal actions, is led to say, 'Sed istæ omnes legis actiones paulatim in odium venerunt. Namque ex nimia subtilitate veterum eo res perducta est, *ut qui minimum errasset litem perderet.*' Of this, indeed, the volumes of Meeson and Welsby might furnish us with instances in abundance."

⁂

IN an old case[3] Hale C. J. said that "if such an action should be allowed," — that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, — "the judgment would be blowed off by a side wind."[4]

[1] Inst. IV. 12. [2] Inst. IV. 30.

[3] Vanderberg *v.* Blake, Hardres, 194.

[4] Quoted by Byles J. in Basebe *v.* Matthews, Law Rep. 2 C. P. p. 687.

LORD BACON relates[1] that in Chancery, one time, when the counsel of the parties set forth the boundaries of the land in question by the plot, and the counsel of one part said, "We lie on this side, my lord," and the counsel of the other part said, "We lie on this side," the Lord Chancellor Hatton stood up and said, "If you lie on both sides, whom will you have me to believe."

⁂

ROLLE reports a case[2] which contains a discussion between the bar and the bench, which deserves a place beside Stradling *v.* Stiles, reported by Pope. The report cannot with good taste be copied; but it is worth reading, in the original, by any one fond of that literature elegantly veiled in French catalogues as "curieux."

⁂

IN the first volume of Cushing's Reports[3] is this marginal note: "The jurisdiction of State courts being limited by State lines, it is difficult to see how the order of a court, served upon a party out of the State in which it is made, can have any greater effect than knowledge brought home to the party in any other way."

[1] Apothegms, pl. 74. Works, Vol. VII. p. 136, ed. Spedding.

[2] White *v.* Brough, 1 Rolle Rep. 286. Wallace The Reporters, 188, 3d ed.

[3] Ewer *v.* Coffin, 1 Cush. 24.

SOME very significant remarks of Lord Holt are found in the case of Wright *v.* Sharp.[1] It was a motion to have exceptions allowed after the trial. Lord Holt said: "You should have insisted on your exception at the trial; you waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause upon this point."

⁂

"HOWSOEVER the verdict seem to stray," says Lord Hobart, "and conclude not formally or punctually unto the issue, so as you cannot find the words of the issue in the verdict, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form, and make it serve."[2]

⁂

IN 1674 Lord Chief Justice North, in his judgment in a celebrated case,[3] says: "These instances shew that an action upon the case is esteemed a *catholicon*," that is, according to Johnson's Dictionary, "an universal medicine."

[1] 1 Salk. 288. Quoted by Shaw C. J. in Holbrook *v.* Jackson, 7 Cush. p. 154.

[2] Foster *v.* Jackson, Hobart, 54. Quoted in Commonwealth *v.* Stebbins, 8 Gray, p. 496.

[3] Barnardiston *v.* Soame, 6 Howell State Trials, p. 1108.

SIR THOMAS CLARKE, Master of the Rolls, observed: "There are two things against which a judge ought to guard, — precipitancy and procrastination. Sir Nicholas Bacon was made to say, which I hope never again to hear, that a speedy injustice is as good as justice which is slow."[1]

⁂

"NOTHING can call this court into activity," judicially observed Lord Camden, "but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing."[2]

⁂

IF one man keeps a school in such a place, another may do so likewise in the same place, though he draw away the scholars from the other school, 't is true, this is damnum, but 't is absque injuria; but he must not shoot guns at the scholars of the other school, to fright them from coming there any more.[3]

⁂

LORD HALE says a jury should be told "where the main question or knot of the business lies."[4]

[1] Atherton *v.* Worth, 1 Dickens, p. 377.

[2] Smith *v.* Clay, 3 Brown C. C. p. 639 note.

[3] Holt Chief Justice, 3 Salk. 10.

[4] History of the Common Law, 256. Quoted in the judgment in Blackburn *v.* Crawfords, 3 Wallace, p. 194.

WHILE Chief Justice Richardson was attending the assizes at Salisbury, a prisoner, whom he had condemned to death for some felony, threw a brickbat at his head; but, stooping at the time, it only knocked off his hat. When his friends congratulated him on his escape, he said, "You see, now, if I had been an upright judge, I had been slain." The additional punishment upon this offender is thus curiously recorded by Chief Justice Trevy in the margin of Dyer's Reports, p. 188 b. "Richardson C. J. de C. B. at Assizes at Salisbury in Summer 1631, fuit assault per Prisoner condemne pur Felony;—que puis son condemnation ject un Brickbat a le dit Justice, que narrowly mist. Et pur ceo immediately fuit Indictment drawn pur Noy envers le Prisoner, et son dexter manus ampute et fixe al Gibbet, sur que luy mesme immediatement hange in presence de Court."

⁂

ONE Brown set forth in libel his descent; that another person, in way of defamation, said he was no gentleman, but descended from Brown, the great pudding-eater, in Kent; but it appearing he was not so descended, but from an ancient family, he that spoke the words underwent the sentence of the court, and decreed to give satisfaction to the party complaining.[1]

[1] Rushworth, Vol. II. pt. 2, p. 1055.

IN Baker *v.* Pierce,[1] Holt C. J. said: "I remember a story told by Mr. Justice Twisden, of a man that had brought an action for scandalous words spoken of him, and upon a motion in arrest of judgment, the judgment was arrested; and the plaintiff being in court at that time said, that if he had thought he should not have recovered in his action, he would have cut his throat."

⁂

IN Massachusetts, in a recent case[2] it was said that "before parties were made competent witnesses, it was the practice to prove their intent by a variety of circumstances, because no man can know the secret purposes of another's heart except himself."

⁂

LEVINZ observes "that the judges of late years have had a greater consideration for the *passing* of the estate, which is the *substance* of the deed, than the *manner* how, which is the shadow."[3]

⁂

ON a question whether a devisee in fee could disclaim the estate, Mr. Justice Ventris is reported to have said that "a man cannot have an estate put into him in spite of his teeth."

[1] 2 Ld. Raym. 960.
[2] Fisk *v.* Chester, 8 Gray, p. 508.
[3] 3 Levinz, 372. Cited 2 Saund. 97 b, 97 c, 6th ed.

IN the celebrated case, Stockdale *v.* Hansard,[1] the Sheriffs of London were imprisoned by the House of Commons for a contempt in doing that for the *not* doing of which the like fate would have awaited them at the bar of the Court of Queen's Bench.

*

MEDLYCOTT *v.* JORTIN[2] was a case upon Mr. Serjeant Hill's will, which was so singularly confused, that but for the respect due to the very learned Serjeant, it might, not unreasonably, have been held void for uncertainty. The will of Sir Samuel Romilly was also inartificially penned, and that of Chief Baron Thomson was the subject of Chancery proceedings. So also were the wills of Chief Justice Holt,[3] Chief Justice Eyre,[4] Mr. Serjeant Maynard,[5] Vernon, the eminent chancery counsel,[6] Baron Wood,[7] Mr. Justice Vaughan,[8] Francis Vesey Junior, the reporter,[9] and Richard Preston, the conveyancer.[10] Chief Justice Saunders appears to have made a speculative devise, upon the validity of which

[1] 9 Ad. & El. 1.
[2] 2 Broderip & Bingham, 632.
[3] Viner Ab. Apportionment, p. 18.
[4] G. Cooper, 156.
[5] Earl of Stamford *v.* Sir John Hobart, 3 Brown P. C. 31.
[6] Acherley *v.* Vernon, 1 P. Wms. 783.
[7] Baker *v.* Bayldon, 31 Beavan, 209. "He was one of the greatest of pleaders." Per Hayes J. in The Queen *v.* Diplock, 10 Best & Smith, p. 175.
[8] Knight *v.* St. John, coram Wood V. C. (1862).
[9] Vesey *v.* Vesey, coram Kindersley V. C. (1862).
[10] Whyte *v.* Preston, coram the Master of the Rolls (1862).

his executors, Maynard, Holt, and Pollexfen, all great lawyers, were divided in opinion.[1] The will of Bradley, the celebrated conveyancer, was set aside by Lord Thurlow for uncertainty.[2] And a late learned Master in Chancery directed the proceeds of his estate to be invested in Consols *in his own name*.[3]

⁂

THE following passage is taken from the preface to Lilly's Reports (A. D. 1719) p. xxix: "I admit that good forms are very necessary, where they relate to the subject-matter, but are ridiculous where they do not; as for instance, the form of a declaration in assault and battery is quare vi et armis (the defendant) in et super (the plaintiff) insultum fecit et baculis gladiis et cultellis verberavit et vulneravit, etc. The very same term was once used by a skilful attorney in an action against the defendant for assaulting the plaintiff's wife, who voluntarily departed from her husband, and lived with the defendant in adultery. I remember great advice was taken about this declaration, and that it was resolved by all the counsel for the plaintiff, that the criminal familiarity of the defendant was very properly expressed by those words, in et super (the plain-

[1] Reports of Cases in the Law of Real Property and Conveyancing, App. 24.

[2] Martin's Conveyancer's Recital Book, 35 note (1834).

[3] Hayes & Jarman Forms of Wills, 98 note, 7th ed. See also 7 Notes of Cases, 377; 2 Robertson Eccl. Rep. 140; Bigge *v.* Bigge, 9 Jurist, 192.

tiff's wife) insultum fecit; but it was strenuously objected against the words vi et armis, because there was an apparent proof of the consent and compliance of the woman, and that baculi gladii et cultelli were improper instruments to carry on an amorous correspondence. After a long debate, a very grave lawyer (whose opinion was to conclude the rest) consented to lay down the cudgels, but would not leave out vi et armis; and his reason was, because they must keep up to the ancient and approved forms."

⁂

THE defendant charged the plaintiff with having attempted to burn the defendant's house. Wray C. J. held that the words were actionable, assigning generally as the reason, that "by such speech the plaintiff's good name is impaired."[1]

⁂

A PROHIBITION was granted on a libel for saying "He has no sense, is a dunce and a blockhead; I wonder the bishop would lay his hands on such a fellow; he deserves to have his gown pulled over his ears"; because a parson is not punishable in the Spiritual Court for being a dunce or a blockhead, more than another man.[2]

[1] Edward's Case, Cro. Eliz. 6.

[2] Coxeter *v.* Parsons, 11 Mod. 141 note.

BY an appeal of death private prosecutors could insist on a second trial for life after an acquittal, and could exercise or withhold according to their caprice, or temper, or cupidity, the divine attribute and royal prerogative of mercy. But such is the force of judicial habit that we find the very distinguished Chief Justice Holt, in the reign of Queen Anne, declaring from the bench, "I wonder that any Englishman should brand an appeal with the name of an odious prosecution; I look at it as a true badge of English liberty." But after the celebrated case of Ashford *v.* Thornton,[1] the legislature looked upon this method of prosecution in an entirely different light, and it was abolished by 59 Geo. III. ch. 46.

※

SIR MATTHEW HALE writes: "A great lawyer hath been much blamed for burning a peer on the hand, that confessed an indictment of manslaughter; and it was the only error of note that the person erred in to my observation."[2]

※

BEFORE the statute 30 Geo. III. women from the remotest times were sentenced to be burned alive for every species of treason; this Blackstone attributes to the regard of our ancestors for "the decency due to the sex."[3]

[1] 1 B. & Ald. 405 (1818)
[2] 2 Hale P. C. 377.
[3] 4 Bl. Comm. 93.

IT is often said satirically, though no satire was originally intended, that corporations have no souls. It would seem that no argument is necessary to prove this legal axiom. Chief Baron Manwood, however, established it by a syllogism, in which it is not easy to detect any fallacy. "The opinion of Manwood C. B. was this, as touching corporations; that they were invisible, immortal, and that they had no soul, and therefore no subpœna lieth against them, because they have no conscience nor soul; a corporation is a body aggregate; none can create souls but God; but the king creates them, and therefore they have no souls. And this was the opinion of Manwood Chief Baron touching corporations."[1]

⁂

SIR SAMPSON DARRELL'S CASE.[2]

SIR SAMPSON DARRELL was fined £5 for erecting a windmill in his own ground, within the forest, and Mr. Attorney Noy said it ought not to be done, because it frighted the deer, and also drew company to the disquiet of the game.

⁂

LIBEL for calling a man a knave: prohibition lies, *because* in the time of Henry VI. knave was a good addition.[3]

[1] 2 Bulstrode, 233.

[2] W. Jones, 293. Transcribed by Mr. Wallace The Reporters, 187, 3d ed.

[3] Latch, 156. 1 Siderfin, 149.

THE proposition for conducting all law proceedings in English was most strenuously opposed. The reporters, who delighted in the Norman French, were particularly obstreperous. "I have made these Reports speak English," says Style in his preface (A. D. 1658), "not that I believe they will be thereby more generally useful, for I have been always and yet am of opinion, that that part of the common law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others than to defend themselves; but I have done it in obedience to authority, and to stop the mouths of such of this English age, who, though they be confessedly different in their minds and judgments, as the builders of Babel were in their language, yet do think it vain, if not impious, to speak or understand more than their own mother tongue." And Bulstrode, in the preface to the Second Part of his Reports, says "that he had many years since perfected the work in French, in which language he had desired it might have seen the light, being most proper for it, and most convenient for the professors of the law."

※

TWISDEN JUSTICE said he remembered that a shoemaker brought an action against a man for saying he was a cobbler; and though a cobbler be a trade of itself, yet it was held that the action lay in Chief Justice Glyn's time.[1]

[1] 1 Mod. 19.

KERIFFORD, an attorney, was plaintiff in battery, and the case was thus: He was walking in the market (as attorneys do too much), and the defendant and he had some angry words there, upon which the defendant did press to go by him, and in going, by reason of the throng of people there, he jostled the plaintiff, and for this he brought this action, in which if an assault only be proved, it is insufficient, and holden it was no assault, for the touching him or jostle was to another end, namely, to get by him in the throng, and not to beat him, etc.[1]

⁂

"MEMORANDUM. — One Mr. Guye Faux of the parish of Leathley, a cavilleer, had a cause heard about a plunder, upon Monday this week after dinner, and was well in court, and damage against him a hundred pounds, and he was found dead next morning upon the conceit of it, as was supposed."[2]

⁂

THE judge did put back the jury twice, because they offered their verdict contrary to their evidence, as he held and set a hundred-pound fine upon one of the jury who had departed from his companions; but after, upon examination, it was taken off again, for that it did appear it was only by reason of the crowd, and some of his fellows were always with him.[3]

[1] Clayton, 22. [2] Ibid. 116. [3] Ibid. 31.

A CASE was recently determined by the Court of Exchequer Chamber which in the opinion of Mr. Justice Blackburn involved "a nice and puzzling question." The question was whether the law as to the liability of gratuitous bailees of personal property applied to a *building*. The plaintiff loaned his shed to the defendant to make a signboard, and D., a carpenter employed by the defendant, while at work lighted his pipe from a match with a shaving, which he dropped, and thereby set fire to the shavings on the ground, by which the shed was burned. A majority of the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, held that the defendant was not liable, on the ground that the loan of the shed was a mere license to use the shed, revocable at any time.[1]

※

IN very early times "every one was to have a remedial writ from the King's Chancery, according to his plaint," of which the following is the most ancient form: —

Rex etc. [to the Judge.] Questus est nobis A. quod B. etc. Et ideo tibi (vices nostras in hac parte committentes) præcipimus quod causam illam audias et legitimo fine decidas.[2]

[1] Williams *v.* Jones, 8 H. & C. 256, 602 (1865). Story on Bailments, § 223 a, 8th ed.

[2] Mirrour of Justices, 8.

IN Manby *v.* Scott,[1] Mr. Justice Wyndham specifies the following among the "many inconveniences which must ensue" if the husband shall be bound by the contract of the wife:—

1. The husband will be accounted the common enemy; and the mercer and the gallant will unite with the wife, and they will combine their strength against the husband.

3. Wives will be their own carvers, and, like hawks, will fly abroad and find their own prey.

4. It shall be left to the pleasure of a London jury to dress my wife in such apparel as they think proper.

5. Wives who think that they have insufficient will have it tried by a mercer whether their dress is not too mean, and this will make the mercer judge whether he will dispose of his own goods or not.

※

IN the case of Hookes *v.* Swaine,[2] Twisden Justice said he remembered a nice case. Sir William Fish was bound by obligation to pay, on a certain day, in Gray's Inn Hall, £50 generally, without saying of money; and therefore upon the day when the gentlemen were at supper, Sir William came in, and tendered fifty-pound weight of stone; and adjudged no tender.

1 Siderfin, 109 (1662, 1663). 2 Smith L. C. 418, 6th London ed.
2 1 Siderfin, 151.

SO completely does a pardon of treason or felony extinguish the crime, that when granted to a man, even after conviction or attainder, it will enable him to have an action of slander against another for calling him traitor or felon; "because the pardon makes him as it were a new man, and gives him a new capacity and credit."[1] "In the eye of the law the offender is as innocent as if he had never committed the offence."[2]

⁂

IN the Year-Books, 30 & 31 Edw. I. pp. 503–507, is this case: A man was arraigned for felony, but on producing a charter of pardon was discharged. Another man was arraigned for harboring him, and, notwithstanding the acquittal of the principal, he was made to pay a fine. The report concludes thus: "Note, the Justices did this rather for the King's profit than in accordance with law; for they gave this decision 'in terrorem.'"

⁂

A WOMAN libelled in the Arches against another for calling of her jade, and a prohibition was prayed and granted, because the words were not defamatory. And Reeve said that for whore or bawd no prohibition would lie, but they doubted of quean.[3]

[1] 2 Hawkins P. C. Ch. 37, § 48. Vol. II. p. 548, ed. Curwood.

[2] Ex parte Garland, 4 Wallace, p. 380. United States *v.* Padelford, 9 Wallace, p. 542.

[3] March, pl. 235.

AN action of false imprisonment brought against a constable, who pleaded not guilty, the defendant did show in evidence, that he came to search in time of the plague for lodgers in the town, and he found a stranger and questioned him which way he came into the town; who answered, Over the bridge, and the judge conceived this to be a scornful answer to an officer, and because he had no pass, but travelled without one, and gave such an answer, the defendant did offer to apprehend him, and the plaintiff thereupon being present said to the defendant, He shall not go to prison, but yet offered to pass his word for his forthcoming, upon which the defendant did commit the plaintiff, and it was ruled upon evidence there was good cause to commit the plaintiff for opposing the constable, though but verbally, in his office, who is so ancient an officer of the Commonwealth.[1]

※

IF B. have a right of entry into his house, he ought to have a common entrance at the usual door, and shall not be made to enter at a hole, a back door, or a chimney; and if they leave the common door open and make a ditch, so that B. cannot enter *without skipping*, the condition is broken. So if I am obliged to suffer J. S. to have a way over my land, and when I see him coming, I take him by the sleeve and say to him, "Come not there; for if you do, I will pull you by the ears," the condition is broken.[2]

[1] Sheffeld's Case, Clayton, 10.

[2] Latch, 47.

THERE are some things personal, and so inseparably connected to a man's person, that he cannot do them by another; as the doing of homage fealty. So it is holden that a lord may beat his villein, for cause or without cause, and the villein is without remedy; but if the lord command another to beat him without cause, who does accordingly, the villein shall have an action of battery against him. So if the lord distrain his tenant's cattle, when nothing is behind, yet the tenant, for the reverence and duty that appertains to the lord, shall not have trespass vi et armis against him; but if the lord command his bailiff or servant to distrain, secus.[1]

※

IN the report of one of the Scotch Appeal Cases in the House of Lords, we find this marginal note:—

"Per The Lord Chancellor: Mrs. Reid is to be pitied for the course into which she has been dragged, evidently without any consciousness on her part of the extreme folly of these proceedings."[2]

And in the very next case in the same volume are these, and only these, marginal notes:—

"Per Lord Chelmsford: It is really lamentable to think of the enormous expense incurred in this case."

"Per Lord Westbury: Such things occur in the appeals from Scotland day by day."[3]

[1] Comb's Case, 9 Rep. 76 a.

[2] Keith *v.* Reid, Law Rep. 2 H. L. Scotch, 39 (1870).

[3] Fraser *v.* Crawford, Law Rep. 2 H. L. Scotch, 42.

"PRAYING general relief," said Lord Hardwicke,[1] "is sufficient though the plaintiff should not be more explicit in the [particular] prayer of the bill; and Mr. Robins, a very eminent counsel, used to say, '*General* relief was the best prayer next to the Lord's Prayer!'"

⁂

IN his Abridgment,[2] Rolle says, "Jeo aie oie mon seigneur Coke a citer two verses pur ceo de Sir Thomas Moore: —

'Three things are to be helpt in conscience:
Fraud, accident, and things of confidence.'"

⁂

ONE suggestion by Mr. John Reeves, the author of the "History of English Law," in his elaborate essay on the effect of the Treaty of Peace of 1783, is amusing enough to be quoted: "I have heard it asked, if the king was to send his writ to command the attendance of Mr. Jefferson in this kingdom? — I agree he would not come; but that would be no test of the law upon the subject; it is an inconvenience in point of fact." The case thus put recalls that of Glendower and Hotspur: —

Glendower. I can call spirits from the vasty deep.
Hotspur. Why, so can I, or so can any man;
But will they come when you do call for them?[3]

[1] Cook v. Martyn, 2 Atkyns, 3. [2] 1 Rolle Abr. 374.
[3] First Part of King Henry IV. Act III. Scene 1. For this passage I am indebted to a writer in The American Law Review, Vol. IV. p. 362.

IN The Emperor of Austria *v.* Day,[1] Lord Campbell Lord Chancellor observed: "Notwithstanding my sincere respect for the authority of that great American jurist, Justice Story, I cannot concur with him in his recommendation of a mysterious obscurity to be preserved by courts of equity respecting special injunctions, and the caution which should make them 'decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions should be granted or withheld.'[2] The recommendation of mystery and obscurity in treating of judicial jurisdiction is only fit for the Star Chamber, which was called 'a Court of Criminal Equity.'"

*

"THE case seems to fall very much within the quaint expressions of Lord Hobart in The Earl of Clanrickard's Case,[3] where that very learned judge says: 'I do exceedingly commend the judges that are curious and almost subtle, astuti (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act.'"[4]

[1] 3 De Gex, Fisher & Jones, 211, 238.

[2] Story Equity Jurisprudence, Vol. II. § 959 b.

[3] Hobart, 277.

[4] Judgment of Byles J. in Hayne *v.* Cummings, 16 C. B. N. S. p. 428.

THE manner in which Sir John Strange occasionally comments on the opinion of the court, in his Reports, is quite amusing. To a remark of the Court he appends the following note: "It was *only* Mr. J. Wright who said this; and see The King *v.* The Inhabitants etc. of Bishopside, Trin. T. 1755. B. R. adjudged, 'contra': and in reference to another part of the same opinion, he says: 'It was *only* Mr. J. Chapple, who said this: and he was wrong; for the Act expressly requires' etc."

⁂

IN Manby *v.* Scott,[1] among the reasons for the second "point there established," it is said: "In the Spiritual Court, such bad women as have violated their vows shall have such provision as clerks convict,[2] and shall be fed with the bread of affliction and the water of adversity."

⁂

"THE law did not condescend to take notice of base animals. A dog was not the subject of larceny at common law, because, as it was said, a man shall not hang for a dog. 7 Rep. 18 a." [3]

[1] 1 Siderfin, 109. [2] Smith L. C. 422, 6th London ed.

[2] Staunforde, 140.

[3] Willes J. in Regina *v.* Martin, Law Rep. 1 C. C. p. 59. See Regina *v.* Robinson, Bell C. C. 34.

IN the reign of Henry VIII. a statute was passed, whereby it was enacted that every woman about to be married to the King, or any of his successors, not being a true maid, should disclose her disgrace to him under the penalty of treason; and that all other persons knowing the fact, and not disclosing it, should be subject to the lesser penalty of misprision of treason.[1] This law, which was afterwards repealed, as "trespassing too strongly as well on natural justice as female modesty,"[2] continued in force during the remainder of this reign, and, according to Lord Campbell,[3] "so much frightened all the spinsters at Henry's court, that, instead of trying to attract his notice, like Anne Boleyn, Jane Seymour, and Catherine Howard, in the hope of wearing a crown, they shunned his approach as if he had been himself the executioner, and they left the field open for widows, who could not by any subtlety of Crown lawyers be brought within its operation."

※

THERE is a curious case in Coke's "Second Institute," p. 562, ed. 1797. Indictment against a parson for conspiracy, who pleads that he was "communis advocatus," and so justified as attorney to the other. It was found that he was "communis advocatus," and not guilty.

[1] Statutes of the Realm, Vol. IV. p. 859.
[2] 1 Bl. Comm. 222.
[3] Lives of the Lord Chancellors, Vol. II. p. 108, 5th ed.

IN the quaint language of Hide J. in Manby *v.* Scott, in the Exchequer Chamber,[1] if "the wife will have a velvet gown and a satin petticoat, and the husband thinks mohair or farendon for a gown, and watered tabby for a petticoat, is as fashionable, and fitter for his quality, who is to decide the controversy? Not the wife, nor a jury it may be consisting of drapers and milliners, but the husband."[2]

⁂

IN the trial of Algernon Sidney, in one respect counsel deserved rebuke, and even Jeffries was not unjust in administering it. Lord Chief Justice: "Look you, gentlemen of the jury. There are some gentlemen at the bar, as we are informed, are apt to whisper to the jury. It is no part of their duty; nay, it is against their duty."[3]

⁂

NOY reports a case in the Star Chamber as follows: "The defendants upon a riot, in destroying sixteen foot of a hedge for a commoner. There they were fined every one 40 *s.* And the plaintiff for suing in that court for that riot was fined £ 20. And so both parties were fined, which was seldom seen before."[4]

[1] 1 Mod. 124, 138.

[2] Quoted in the Judgment of Blackburn J. in Bazeley *v.* Forder, 9 Best & Smith, p. 604; Law Rep. 3 Q. B. p. 564.

[3] 9 Howell State Trials, 837.

[4] Bellew *v.* Bullocke, Noy, 101.

IN Tremaine's "Placitæ Coronæ," pp. 34, 35, is a precedent of an indictment against Sir John Johnston, a Scotch knight, for stealing and marrying one Mary Wharton, an heiress, "to the great displeasure of Almighty God, to the great disparagement of the said Mary, and to the utter sorrow and affliction of her friends." Tremaine writes in a note: "Sir John Johnston was a stranger to the English laws, and when he was called to judgment was much surprised, and asked if it was a hanging matter; but nevertheless sentence was given against him, and he was executed on a gibbet before the lady's door in Great Queen Street."

⁂

IN an appeal of death, the defendant waged battel, and was slain in the field; yet judgment was given that he should be hanged, which the judges said was altogether necessary, for otherwise the lord could not have a writ of escheat.[1]

⁂

IN the Year-Book, 22 Henry VI., we find counsel responding to one of the judges, who was putting a case to him from the bench about making a view in assize: "En le nom de Dieu, Sir, comment poit le vieu estre fait en ce cas?"[2]

[1] Co. Litt. 390 note.

[2] 22 Hen. VI. p 11, about the middle of the page, quoted in The Reporters, 73, 3d ed.

COOPER brought an action upon the case against Witham and his wife, for that the wife, maliciously intending to marry him, did often affirm that she was sole and unmarried, and importuned et strenue requisivit the plaintiff to marry her; to which affirmation he gave credit, and married her, when in facto she was wife to the defendant; so that the plaintiff was much troubled in mind, and put to great charges, and much damnified in his reputation. He had a verdict, but no judgment; for by Twisden Justice the action lies not, because the thing here done is felony: no more than if a servant be killed, the master cannot have an action per quod servitium amisit, quod curia concessit.[1]

※

IN an early case in Massachusetts,[2] Mr. Justice Parker expressed his opinion in the following forcible language: "It would seem a disgraceful occupation of the courts of any country to sit in judgment between two gamblers, in order to decide which was the best calculator of chances, or which had the most cunning of the two. There could be but one step of degradation below this, which is, that the judges should be the stakeholders of the parties."

[1] 1 Siderfin, 375.

[2] Amory *v.* Gilman, 2 Mass. p. 6.

IN a case in Gouldsborough, p. 96, one of the counsel said that he had searched all the books, and "there is not one case" etc.; to which Chief Justice Anderson responded: "What of that? Shall not we give judgment because it is not adjudged in the books before? We will give judgment according to reason; and if there be no reason in the books I will not regard them."[1]

⁂

"ONE of the cases in Littleton," says Mr. Wallace,[2] "would present but a bad idea of the manners at Oxford in 1625. We find at least the Principal of St. Mary's Hall libelling one of the Masters of Art, and a Commoner of the same Hall, 'pur ceo que il appel luy Red Nose, Mamsey Nose, Copper-nose Knave, Rascal, and Base Fellow et autres words non dissonant.'[3]

"Another case[4] speaks as ill of the behavior of communicants in those days of Archbishop Laud. The Reverend Mr. Burnet sues one Symons in the High Commission Court, 'pur ces que appel luy fool en leglise et dit a lui Sirrah! Sirrah!' and because, moreover, he, Burnet, being vicar there, Symons, at

[1] "Though a case is of first impression, if it shows a concurrence of loss and damage arising from the act complained of, the action will be maintainable." Lord Campbell Lord Chancellor in Lynch *v.* Knight, 9 House of Lords Cases, 577.

[2] The Reporters, 193, 3d ed.

[3] Ralph Bradwell's Case, Littleton, 9.

[4] Burnet *v.* Symons, Littleton, 154.

Whitsuntide, after the Communion was ended, took the cup and drank all the wine that was left; and that, when Mr. Burnet took the cup from him, 'Symons violently reprise ces hors de ses mains arriere in facie Ecclesiæ devant que les parishioners fueront tous dehors leglise.' It is curious, and perhaps worth noting," continues Mr. Wallace, "that the court decided that all the wine that was left after the Communion belonged to the parson. The same declaration will be found, I believe, in the rubric to the Book of Common Prayer, printed in the time of Charles II. It shows the doctrine of that day, though at present a special and more reverent provision is made for the case."

*

IN Rolle's Reports, Vol. I. p. 286, in an action for words, the case is, "Home dit, Sir Th. Holt hath taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder, and the other upon the other shoulder, et ne averr que le cook fuit mort; et pur ceo fuit adjudge nemy bon"; the cook's death, after the splitting of his head, being matter of inference only. Mr. Wallace says this case may be commended to Mr. Chitty, who may, perhaps, reconcile the matter of pleading involved in it with the doctrines of Medical Jurisprudence.

THE gravity of the poor laws was enlivened, and the sterility of settlement cases agreeably refreshed, by a catch introduced by Sir James Burrow into the report of The King *v.* Norton.[1] The reporter says: "I do not find the case of Shadwell and St. John's Wapping [which had been cited in the argument] in any printed book or manuscript. But I guess it to be the same case which I have heard reported in the form of a catch, to the following effect (if my memory serves me right):—

"A Woman having a Settlement,
Married a Man with none:
The Question was, he being dead,
'If that she had, was *gone*.'
Quoth Sir *John Pratt*[2]— 'Her Settlement
SUSPENDED did remain
Living the husband: But, him dead,
It doth *revive* again.'"

CHORUS *of Puisne Judges.*

Living the Husband: But, him dead,
It doth revive again.

⁂

IT is a rule of law, that Idem non potest esse agens et patiens; and therefore a man cannot present himself to a benefice, nor sue himself.[3] No man can summon himself; and therefore if a sheriff suffer a common recovery, it is error, because he cannot sum-

[1] Burrow S. C. 124.
[2] Then Lord Chief Justice.
[3] Littleton, 147 b.

mon himself.[1] A man cannot be both judge and party in a suit; and therefore if a judge of the Common Pleas be made judge of the King's Bench, though it be but hac vice, it determines his patent for the Common Pleas; for if he should be judge of both benches together, he should control his own judgment; for if the Common Pleas err, it shall be reformed in the King's Bench.[2] Littleton, Chief Justice of the Common Pleas, was made Lord Keeper, yet continued Chief Justice. And Sir Orlando Bridgeman was both Lord Keeper and Lord Chief Justice of the Common Pleas at the same time, for these places are not inconsistent.[3]

※

A few years ago, a learned member of Parliament brought in a bill with the double object of providing public prosecutors for England, and making it a statute offence for a servant to steal his master's corn for the purpose of feeding the master's horse.

※

A guest comes into a common inn, and the host appoints him his chamber, and in the night the host breaks into his guest's chamber to rob him: this is burglary.[4]

[1] Dyer, 188 a. Owen, 51.
[2] Cro. Car. 600.
[3] 1 Siderfin, 338, 365.
[4] Dalton, cap. 151, in nota.

THE case of The King *v.* Burford is thus reported in Ventris[1]: "He was indicted, for that he scandolose et contemptuose propalavit et publicavit verba sequentia, viz.: That none of the justices of the peace do understand the Statutes for the Excise, unless Mr. A. B., and he understands but little of them; no, nor many parliament-men do not understand them upon the reading of them. And it was moved to quash the indictment, for that a man could not be indicted for speaking such words; and of that opinion was the court: But they said he might have been bound to his good behavior." If a man was indicted in this country at the present day for speaking similar words, he might with great propriety plead the truth in justification.

⁂

KELYNG reports: "At the Lent Assizes at Winchester (18 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners being about to give it to an old thief, I directed him to deal clearly with me, and not to say 'legit' in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all, and yet the bishop's clerk, upon the demand of '*legit* or *non* legit?' answered 'legit.' And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon

[1] 1 Ventris, 16.

he answered again, something angrily, 'legit.' Then I bid the clerk of assize not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court. And so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read. Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks." [1]

※

IN Lambard's "Eirenarcha," p. 68 (1581), it is written: "Of this kind of punishment [not capital] our old law, making pretious estimation of the lives of men, had more sortes than we now have, as pulling out the tongue for false rumours, cutting off the nose for adultery, taking away the privy parts for counterfeiting of money etc."

※

IN the preface to his Reports (A. D. 1668), Carter writes: "In the arguments of Chief Justice Bridgeman methinks I find that evisceratio causæ, as the Roman orator calls it, an exact anatomy of the case, and a dexterous piercing into the very bowels of it."

[1] Kelyng, p. 51.

THE judges determined that Lord Audley's wife might give evidence against him, for having aided one of his servants in committing a rape upon herself. They held that where a wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness: and a curious reason assigned is, that in such a case a villain may be a witness against his lord.[1]

※

IN a recent case[2] Mr. Justice Byles observed: "I was much struck with the quotation from Webster's Dictionary where one of the definitions given of 'tenant' is, one who has the occupation or temporary possession of lands or tenements whose title is in another." The quotation is from Cowley: —

> O fields, O woods, O, when shall I be made
> The happy *tenant* of your shade?

※

AS a general rule a piece of paper or parchment, whether blank or inscribed with any characters, is the subject of larceny. But there are at common law two exceptions: first, a muniment of title to land, which, it is held, savors of the realty; secondly, a written paper, which is mere evidence of a right,

[1] 3 Howell State Trials, 402, 413. Hutton, 115, 116.
[2] Birks *v.* Allison, 9 Jurist N. S. 694, 695. 13 C. B. N. S. 12, 23.

resting in contract only, like a bill, note, bond, or executory agreement. A reason given in both these cases is this, that the documents are of no use to any but the owner, and therefore are not in danger of being stolen. On which it has been well remarked, that "if I steal a skin of parchment worth 1 *s.* it is felony, but when it has £10,000 added to its value by what is written upon it, then it is no offence to take it away."[1] These exceptions are palpably capricious and unreasonable, and are not to be extended. Therefore it has been held that a pawnbroker's ticket may be the subject of larceny.[2]

⁂

IN "The Epistle Dedicatory" to Croke's Reports, Sir Harbottle Grimston writes of the reporter, his father-in-law, that he was continued a judge of the Court of King's Bench "till a certiorari came from the great Judge of heaven and earth to remove him from a human bench of law to a heavenly throne of glory."

⁂

IT was pleaded on behalf of a Hundred charged with a loss incurred by robbery on Gad's Hill, that, time out of mind, it had been customary to rob upon Gad's Hill.

[1] Rex *v.* Westbeer, 2 Strange, 1133.
[2] Regina *v.* Morrison, Bell C. C. 158.

A the attorney of B. brought an action against C. for saying to B., "Your attorney is a bribing knave, and hath taken twenty pounds of you to cozen me." Judge Warburton was of opinion that the words were not actionable, for an attorney cannot take a bribe of his own client; but Lord Hobart said he might when the reward exceeds measure, and the end of the cause of reward is against justice; as if he will take a reward to raze a record etc. And Hobart reports that after he had spoken, Justice Warburton said that he began to stagger in his opinion, and the plaintiff had judgment.[1]

※

WORDS spoken of an attorney, "Thou canst not read a declaration," per quod etc. The court: The words are actionable, though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes etc. — Judgment was given for the plaintiff.[2]

※

LET the following case be a warning to all bad cooks. Trin. 8 Hen. IV. Rot. 47. Willielmus Milburn recuperat per juratam per billam suam, in qua queritur versus Johannem Cutting Cook de eo quod ipse Johannes apud Westmonasterium ven-

[1] Hobart, 8, 9. 1 Rolle Ab. 53. [2] Jones *v.* Powel, 1 Mod. 272.

debat dicto Willielmo unum caponem pistum corruptibilem et recalefactum, qui capo assatus per quatuor dies in Hospicio Domini Regis et iterum calefactus et pistus extitit, de quo postquam edit vomitum horribilem fecit, ita quod infirmabatur per duas septimanas, recuperat inquam viginti solidos per damnis. And Rolle says he was informed that it appears upon the record at large that the justices increased the damages.[1]

※

A woman shook a sword in a cutler's shop against the plaintiff, being on the other side of the street; and in trespass for assault and battery, there was a verdict of the assault, and not guilty of the battery. It was prayed to give no more costs than damages, and so granted; which was a noble.[2]

※

AN infant brought an action of trespass by her guardian; the defendant pleads that the plaintiff was above sixteen years old, and agreed for sixpence in hand paid, that the defendant have license to take two ounces of her hair; to which the plaintiff demurred, and adjudged for her, for an infant cannot license, though she may agree with the barber to be trimmed.[3]

[1] 1 Rolle Ab. 89. [2] Smith *v* Newsam, 3 Keble, 283.
[3] Scroggam *v.* Stewardson, 3 Keble, 369.

A very curious document has been issued from the Parliamentary printing-office. It is the bill which has passed the Commons, entitled "An Act to repeal certain statutes, which are sleeping and not in use," and it is made singular by the fact that in it are recapitulated numerous samples of ancestral wisdom. One of the statutes provides "that no man shall ride in harness within the realm nor with launcegays." Another says, "the rates of laborers' wages shall be assessed and proclaimed by the justices of the peace, and they shall assess the gains of victuallers, who shall make horse-bread, and the weight and price thereof." A third defines "what sort of Irishmen only may come to dwell in England" (this has been sleeping a very long time); and a fourth is framed to prevent a butcher from slaying any manner of beasts within the walls of London.

⁂

IN the Statutes at Large some funny things may be found. There is one which is not to be brought to book, and must be given as a tradition of the time when George III. was king. Its tenor is, that a bill which proposed, as a punishment of an offence, to levy a certain pecuniary penalty, one half thereof to go to his Majesty and the other half to the informer, was altered in committee, in so far that, when it appeared in the form of an act, *the punishment* was changed to whipping and imprisonment, the *destination* being left unaltered.

It is wonderful that such mistakes are not of frequent occurrence when one remembers the hot, hasty work often done by committees, and the complete entanglements of sentences on which they have to work. Bentham was at the trouble of counting the words in one sentence of an Act of Parliament, and found that, beginning with "Whereas" and ending with the word "repealed," it was precisely the length of an ordinary three-volume novel.

⁂

SIR MATTHEW HALE did not extend his supremacy over the entire See of the Criminal Law; and therefore, when Lord Campbell writes of his History of the Pleas of the Crown, that it is a "*complete* digest of the Criminal Law as it existed in Sir M. Hale's day," he must be understood as expressing, in an equitable sense, that what was intended to be done was done.[1]

⁂

A translator of Latin law-maxims translated "messis sequitur sementem," with a fine simplicity, into "the harvest follows the seed-time"; and "actor sequitur forum rei," he made "the agent must be in court when the case is going on." Copies of the book containing these gems are exceedingly rare, some malicious person having put the author up to their absurdity.

[1] Ruins of Time, by Amos, p. 8.

IN the Court of Queen's Bench, the name of Mr. Charles Dickens having been called, Lord Campbell said: "The name of the illustrious Charles Dickens has been called on the jury, but he has not answered. If his great Chancery suit had been still going on, I certainly would have excused him; but, as that is over, he might have done us the honor of attending here, that he might have seen how we went on at common law."

⁂

IF one that is seised in fee of an orchard makes a feoffment of it to J. S., and goes into the orchard and cuts a turf or a twig, and delivers it in the name of seisin to the feoffee over a wall of the same orchard, the feoffee then being on other land not mentioned in the feoffment, this is a void livery.[1] As to when a man shall give and take by his own livery, see Perkins, § 205.

⁂

A searcher after something or other, running his eye down the index of a law-book through letter B, arrived at the reference "Best — Mr. Justice — his great mind." Desiring to be better acquainted with the particulars of this assertion, he turned to the page referred to, and there found, to his entire satisfaction, "Mr. Justice Best said he had a great mind to commit the witness for prevarication."

[1] 2 Rolle Ab. 6, pl. 5.

"THOUGH the court may order an election nunc pro tunc," said Mr. Justice Maule, "it is beyond the power of the courts, or of an Act of Parliament to recall a day that has passed, or make a thing which has happened not to have happened."

Non tamen irritum
Quodcunque retro est efficiet.[1]

That, according to the writer, is beyond the power of Omnipotence itself.[2]

※

AN innkeeper recently appeared at the Borough Police Court, on a summons which charged him with having his house open before one o'clock on 19th August, that being "the Lord's day." It was objected by the counsel who appeared for the defendant, that the term "Lord's day" was a misnomer according to the Act of Parliament, which specified "Sunday"; and the objection being sustained by the magistrates, the case was dismissed.

※

LORD HOLT, after stating that if a man is wrongfully brought into a jurisdiction and there lawfully arrested, he ought to be discharged, lays down the broad position, that "no lawful thing, founded upon a wrongful act, can be supported."[3]

[1] Hor. III. Carm. 29 45.

[2] Mayor etc. *v.* Oswald, 3 El. & Bl. 670.

[3] Luttin *v.* Benin, 11 Mod. 50. Quoted in Ilsley *v.* Nichols. 12 Pick. p. 275.

MR. JUSTICE WILLES, to illustrate the absurdity into which judges would inevitably fall, unless they applied the rules of common sense to restrict the extent of liability for the breach of a contract of the class then under consideration, observed: "Cases of this kind have always been found to be very difficult to deal with, beginning with a case said to have been decided about two centuries and a half ago, where a man going to be married to an heiress, his horse having cast a shoe on the journey, employed a blacksmith to replace it, who did the work so unskilfully that the horse was lamed, and, the rider not arriving in time, the lady married another; and the blacksmith was held liable for the loss of the marriage." [1]

※

IN the report of a case in the State Trials, is this passage: "First came the execution, then the investigation, and last of all, or rather not at all, the accusation."

※

THE Irish statute-book opens characteristically with "An Act that the King's officers may travel *by sea* from one place to another within *the land* of Ireland."

[1] British Columbia Saw Mill Co. *v.* Nettleship, Law Rep. 3 C. P. p. 508.

IN "Hortensius," p. 259 note, a most amusing instance of identification of counsel with client is related. It occurred in the case of a counsel for a female prisoner who was convicted on a capital charge, and on her being asked what she had to say why sentence of death should not be passed upon her, he rose and said, "If you please, my lord, *we are with child.*" He was, however, wrong in point of law, — for pregnancy cannot be taken advantage of in arrest of judgment, but only in stay of execution.

⁂

IN a very recent case in Vermont,[1] we find the gravity of the discussion relative to the rights of two mill-owners enlivened by a quotation from Don Juan. Mr. Justice Barrett, in delivering the judgment of the court, quotes this line, —

"Saying 'I will ne'er consent,' consented."[2]

⁂

IN the tenth London edition of Byles on Bills, p. 62, we find a case cited from "1 Massey's American Reports." The case is reported in 4 Mass. 45.

⁂

"ONE half of the English language," said Baron Alderson, "is interpreted by the context."[3]

[1] Kimball *v.* Ladd, 42 Vermont, p. 756.

[2] "And whispering 'I will ne'er consent,' — consented." Canto I. St. 117.

[3] 9 Dowl. P. C. 245.

THE first case in which the name of Chief Justice Shaw appears in the Reports is the well-known case of Young *v.* Adams.[1] The amount involved was five dollars. The case was this: A note was payable in foreign bills. The promisor paid it, and the note was given up; but one of the notes given in payment was a counterfeit bill. The payee brought his action for the amount of the counterfeit note. Mr. Shaw, for the defendant in error, put his defence on two grounds: first, that an action for money had and received would not lie; and secondly, — the ground on which he principally relied, — that where there was no fraud and no express undertaking, and both the parties were equally innocent, *no* action would lie. The case was decided for the defendant in error, the plaintiff in the court below.

⁂

WHAT old Rastell says in the following passage is strictly true: "This book entituled a collection of entrees, contayneth the forme and maner of good pleading, which is a great part of the cunning of the law of England, as the Right worshipfull and great learned man Syr Thomas Litleton, knight, sometime one of the Justices of the Common place, in his third book of Tenures, in the chapter of confirmation, saith to his sonne."[2]

[1] 6 Mass. 182, A. D. 1810.

[2] Rastell's Entries, written in 1564.

IN "The Merry Wives of Windsor," Act II. Scene 2, where Ford, disguised, tries to induce Falstaff to assist him in his intrigue with Mrs. Ford, and states that for all the money and trouble he had bestowed upon her he had received no satisfaction, nor promise of any at her hands, there is this passage:—

Falstaff. Of what quality was your love, then?

Ford. Like a fair house, built upon another man's ground; *so that I have lost my edifice by mistaking the place where I erected it.*

In 1852, by a decision of the Supreme Judicial Court of Massachusetts, the town of Sudbury in the county of Middlesex lost a school-house "by mistaking the place where they erected it."[1] The principle is technical, and one of great antiquity.

⁂

AN assault was laid twenty-one different ways in an indictment. And on motion to strike them out, the court thought the clerks in the Crown office ought only to draw the indictments, and then the court could punish them for the vexation.[2]

⁂

IT has been said by first-class authority, that in the opinion in the case of Brattle Square Church *v.* Grant,[3] "the law assumes the beauty and precision of the exact sciences."

[1] First Parish in Sudbury *v.* Jones, 8 Cush. 184.

[2] Rex *v* Pewtress, 2 Strange, 1026.

[3] 8 Gray, 142.

LITTLETON thus describes the villein service: Tenure in villenage is most properly when a villein holdeth of his lord, to whom he is a villein, certain lands or tenements according to the custom of the mannor, or otherwise, at the will of the lord, and to do his lord villein service; as to carry and re-carry the dung of his lord out of the city, or out of his lord's mannor, unto the land of his lord, and to spread the same upon the land, and such like.[1]

⁂

LORD BACON'S enunciation of the maxim, In jure non remota causa, sed proxima spectatur, as an example of a clear and concise statement of a legal proposition has never been surpassed: "It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree."

⁂

THE obsequious Parliament of Richard III. passed, at the special instance of that famous sovereign, a number of private Acts, one of which was "to prove the King to be true and undoubted heir to the Crown, and to make his brother's children bastards"; and the bulk of these enactments was quite in accordance with this sample.

[1] Tenures, Lib. II. § 172.

MR. JUSTICE CARR thus concludes his judgment in Watkins *v.* Crouch:[1] "It will be observed that I have cited no cases in support of this opinion; not that I have not read, and considered, and puzzled myself with the multitude that were commented on in the argument; but because, finding them like the Swiss troops, fighting on both sides, I have laid them aside and gone upon what seems to be the true spirit of the law."

⁂

THE rule of pleading by which a plea in abatement is required to give the plaintiff a better writ is lucidly stated in Britton: "If the tenant says that he does not hold the whole, then he ought to declare who holds the residue. For we will that before writs be abated for a fault or error, the tenants inform the plaintiffs how they shall purchase good writs."[2]

⁂

"IN examining of a witness, counsel cannot question the whole life of the witness, as that he is a whoremaster etc. But if he hath done such a notorious fact which is a just exception against him, then they may except against him. That was Onbie's case of Gray's Inn; and by all the judges it was agreed as before."[3]

[1] 5 Leigh, p. 530.

[2] Britton, Liv. III. ch. XXI. Vol. II. p. 145, ed. Oxford, 1865.

[3] March, pl. 136.

LORD COKE'S commentary on Twyne's Case sinks into utter insignificance in comparison with the following passage addressed to the Supreme Court of the United States, in solemn argument: "Fraud vitiates everything into which it enters. It is like the deadly and noxious simoom of arid and desert climes. It prostrates all before its contaminating touch, and leaves death only and destruction in its train. No act however solemn, no agreement however sacred, can resist its all-destroying power." [1]

※

THE government cannot be carried on without officers; therefore a refusal, without lawful excuse, to accept of a public office to which a person has been duly elected, is indictable. "Happily there is in this country," observes Mr. Bishop, "widely diffused, a commendable willingness to do this duty; therefore indictments for the breach of it are rare." [2]

※

"ANTIQUITY of time fortifies all titles, and supposeth the best beginning the law can give them." [3]

[1] Commercial Bank of Manchester *v.* Buckner, 20 Howard, p. 109.

[2] 1 Comm. on Crim. Law, § 912.

[3] Lord Hobart, in Slade *v.* Drake, Hobart, 295. Quoted in the considered judgment in Ellis *v.* Mayor etc. of Bridgnorth, 15 C. B. N. S. p. 77.

IN striking contrast with the inflated eulogies prefixed to the posthumous editions of some of the old reporters is the preface to Durnford and East, par excellence the "Term Reports": "In a work of this kind all that can be expected is accuracy; to polish and digest properly requires long time and much labour." For care and accuracy of finish, and a matchless propriety of style, which they everywhere maintain, these reporters have never been surpassed.

⁂

"ALMOST all who sign as surety," says Chief Justice Appleton, "have occasion to remember the proverb of Solomon: 'He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure.' But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail." [1]

⁂

"I take the law to be," said Mr. Justice Blackburn, "that you must not injure the property of your neighbour, and consequently, if filth is created on any man's land, then in the quaint language of the report in Salkeld,[2] 'he whose dirt it is must keep it that it may not trespass.'" [3]

[1] Mayo *v.* Hutchinson, 57 Maine, p. 547.
[2] Tenant *v.* Goldwin, Salk. p. 361.
[3] Hodgkinson *v.* Ennor, 4 Best & Smith, p. 241.

BELLEWE, in the preface to his Reports, quaintly says to the reader: "Beseeching you that where you shall find any faults, which either by my insufficiency, the intricateness of the work, or the Printer's recklessness, are committed, either friendly to pardon, or by some means to admonish me thereof."

⁂

IN the time of that great Admiralty judge, Lord Stowell, such was the paucity of legal business, that he objected at first to Reports of the proceedings, "fearing lest the Report should expose the nakedness of the land." [1]

⁂

IN Phillimore's Ecclesiastical Reports is this case: In a libel for divorce, the allegation was, that the male member was soft and short, but the court said, this did not always continue.[2]

⁂

AN old English statute commenced by an enactment relating to the admission of attorneys, and finished by prohibiting the importation of horned cattle.

[1] Coote New Practice of the Court of Admiralty, Preface, p. v, 1st ed.

[2] Grimbaldiston *v.* Anderson, cited in Norton *v.* Seton, 3 Phillimore, p. 155. 1 Bishop on Marriage and Divorce, § 585.

THE following case, says an able writer, as relating to the official conduct of one of the greatest judges that ever sat on the King's Bench, cannot fail to give rise, in the mind of the discerning reader, to many interesting reflections.

In the month of November 1768, a woman having appeared before two of his Majesty's justices of the peace to swear a child against the secretary to Count Bruhl, the Saxon minister, the Count interfered, and the justices were afraid to proceed. The woman applied to Sir Fletcher Norton, who advised that a motion should be made, in the Court of King's Bench, for a peremptory mandamus to the justices to proceed in that filiation. The motion was accordingly made by Mr. Mansfield.

The Lord Chief Justice Mansfield received it with marks of anger and surprise; he said he did not understand what was meant by such collusive motions, unless it was to draw from that court an opinion upon the privileges of foreign ministers, which they had no right to meddle with; that the motion was absolutely improper; that he wondered who advised it, and that he certainly should not grant the mandamus.

Sir Fletcher Norton then got up, and said that the party was his client; that his Majesty's subjects, when injured, had a right to redress somewhere or other; and that he knew of no place where such redress could be legally applied for or obtained, but in the Court of King's Bench; that therefore he had advised the motion.

Lord Mansfield, upon this, began to flourish, in his usual style, upon the sacred privileges of ambassadors, the law of nations etc. etc., repeated something about collusive motions, and took notice that the application for redress ought regularly to have been made to Count Bruhl, or to his Majesty's attorney-general.

Mr. Justice Aston said, deliberately, that he agreed entirely with the Lord Chief Justice, and that the motion ought not to be granted.

Sir Fletcher Norton then said that after he had declared *himself* the adviser of the motion, he did not expect to have heard it again called *collusive;* that he despised and abhorred all ideas of *collusion* as much as any man in that court; that it was the first time, and he hoped it would be the last, that he should hear the Court of King's Bench refer an injured subject of England to a *foreign minister* or to an *attorney-general* for redress; that the laws of this country had not left his Majesty's subjects, complaining of injury, without a legal and certain protection; that their claim was a claim of *right,* upon which the Court of King's Bench had full authority to inquire, and *must* determine; that if his clients were injured, he should always bring them to that court for redress, let who would have committed the injury, and he would take care that that court *should* do them justice; that his motion was proper and *should not* be withdrawn.

Judge Yates then said that the reasons offered by Sir Fletcher Norton had clearly convinced him; that he had not the least doubt of the authority of the court to protect his Majesty's subjects; and that, for his part, he should never refer them either to a foreign minister or to an officer of the Crown; that he thought the motion perfectly regular, and that it ought to be granted.

Judge Aston then began to recant. He said that he was always glad to be convinced of a mistake, and happy in having an early opportunity of acknowledging it; that, from what his brother Yates and Sir Fletcher Norton had said, he saw clearly that his first opinion had been erroneous, and that he agreed the motion ought to be granted.

Lord Mansfield then, in great confusion, said that he should take time to consider of it. To this Sir Fletcher Norton replied, that, as two of the three judges were of the same opinion, the motion *must* be granted; but that, for his part, if his lordship wanted any time to consider whether, when a subject applied to the Court of King's Bench for redress, he was or was not to be referred to a foreign minister or to an attorney-general, he had no objection to allowing him all the time he wanted.

⁂

"THE sparks of all sciences in the world," said Sir Henry Finch, "are taken up in the ashes of the law."

IN considering presumptions which tend to establish the offence of adultery, regard is had to the peculiar modes of life of the parties, and the habits of the community wherein they dwell. Thus where the parties are near of kin, or sustain the relation of physician and patient, a carnal intercourse will be less readily inferred; and, according to the old canonists, if a clergyman is found embracing a woman in some secret place this does not, as in the case of other people, prove adultery, for "he is not presumed to do it on the account of adultery, but rather on the score of giving his benediction, or exhorting her to penance,"[1] — "a good illustration of the principle," observes Mr. Bishop, "though few judges in modern times would yield so much to clerical virtue as this application of the principle implies."[2]

⁂

IN the Year-Book, 22 Edw. IV. 20, is a case to this effect: "The Abbot of St. Albans sent his servant to a feme covert to come to his master and speak with him. The servant performed his command, and thereupon the woman came with him to the Abbot; and when the Abbot and the woman were together, the servant (who knew his master's will) withdrew from them, and left them two in the chamber alone; and then the Abbot said to the woman that her apparel was gross apparel; to whom the woman said that her

[1] Ayliffe Parergon, 51.

[2] Bishop on Marriage and Divorce, Vol. II. § 681.

apparel was according to her ability, and according to the ability of her husband: the Abbot (knowing in what women repose delight) said to her, that if she would be ruled by him, she should have as good apparel as any woman in the parish, and solicited her chastity: when the woman would not consent to him, the Abbot assaulted her, and would have made her an ill woman against her will, which she would not suffer; whereupon the Abbot kept her in his chamber against her will, and to the intent etc. The husband, having notice of this abuse to his wife, spoke of all this matter, and said that he would have his action of false imprisonment against the Abbot, for that he had imprisoned his wife: whereupon the Abbot (adding one sin to another) sued the innocent and poor husband for defamation in the Spiritual Court, because the husband had published that the Lord Abbot had solicited his wife's chastity, and would have made her an ill woman: but upon all this matter disclosed to the court, the husband had a prohibition, because the husband might have an action at the common law for this assault and imprisonment of his wife, although he then had no action, nor perhaps never would; yet because the scandal determinable in the Ecclesiastical Court was upon the matter disclosed, mixed with matter determinable at the common law, for this cause, upon a motion made by the Abbot's counsel to have a 'consultation' in that case, it was denied by the court."

LORD CHANCELLOR THURLOW held, upon the construction of the Statute of Frauds, which requires that a will of lands shall be subscribed by the witnesses in the *presence* of the testator, that a will was well executed where a lady who made it, having signed it in an attorney's office, got into her carriage, and the carriage was accidentally backed by the coachman opposite to the window of the office, so that, if she had been inclined, she might have let down the glass of the carriage and seen the witnesses subscribe the will.[1]

⁂

IN Forsyth's "Constitutional Law," p. 246 note, a case is related of a lady of rank who, being pressed by her creditors, married a convict in prison under sentence of transportation; and, having become a married woman, she was released from her debts and from liability to arrest. She took care, however, not to follow her husband to a penal settlement.

⁂

A WOMAN of full age contracted matrimony with a lad of twelve years, and solemnized it in the face of the church, and in some way consummated it, the man being put into the bed with her; and he died before the age of consent. In a cause of dower this is true matrimony.[2]

[1] Casson *v.* Dade, 1 Brown C. C. 99. Dickens, 586.

[2] Dyer, 369 a. pl. 48, 49.

THE indictment against John Bunyan ran thus: "John Bunyan hath devilishly and perniciously abstained from coming to church to hear Divine service, and is a common upholder of several unlawful meetings and conventicles, to the disturbance and distraction of the good subjects of this kingdom, contrary to the laws of our sovereign lord the King." He was convicted and imprisoned twelve years and six months.

⁂

IN the course of the argument in Lincoln *v.* Wright,[1] Lord Langdale observed: "All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness if he knew anything about something."

[1] 4 Beavan, p. 171. With regard to leading questions it would be useful for the objector to remember the remark of Lord Ellenborough: "I wish that objections to questions as leading might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry. If questions are asked to which the answer yes or no would be conclusive, they would certainly be objectionable; but, in general, no objections are more frivolous." Nicholls *v.* Dowding, 1 Starkie N. P. C. 81.

In this connection the following anecdote is worthy of transcription: Serjeant Davy was often employed at the bar of the House of Commons. On one occasion he called a witness to prove some point, and put a question of no great importance which was immediately objected to by the opposite counsel. The counsel on both sides, according to the usual form, were ordered to withdraw, and the House began to debate on the propriety of the question. The discussion lasted for *some hours;* but at length the determination being in favor of Davy, he was called in, and the Speaker informed him he might put the question. "I protest, Mr. Speaker," replied Davy, "*I entirely forget what it was.*" This, as may easily be believed, threw the House into a roar of laughter.

FORMERLY if a bill was brought into Parliament at the close of the session, and passed on the last day, which made an act previously innocent criminal, and even capital, and if no day was fixed for the commencement of its operation, it was considered to have been passed on the first day of the session; and the consequence was, that all who had in the mean time been doing what at the time was perfectly legal were liable to suffer the punishment created by statute.[1]

⁂

"A BILL of exception," says Clayton, "is to prevent the precipitancy of the judge, and ought to be allowed in all courts and in all parts of the pleading, and may be put in any time before the jury have given their verdict. Quod nota."[2] The further proceeding provided by statute in Massachusetts "to prevent the precipitancy of the judge" by settling the truth of exceptions when he disallows or alters the same, was probably unknown in Clayton's time.

⁂

CLAYTON reports that a challenge to a jury was directed by the court to commence in this form: "May it please you, Mr. Justice Barkley" etc. And he calls attention to "the modesty of the judge at this time, not to direct to say, 'May it please your Lordship.'"

[1] Latless *v.* Holmes, 4 T. R. 660.

[2] Clayton, 158.

"IN an action of assumpsit for money due, the plaintiff laid it in his declaration to be payable upon request: and by his witness it did appear that a fortnight's time was given for the payment of it, and though this fortnight's time was given for the payment of it, and though this fortnight's time was past long before this action was brought, yet now it was held a failure in the proof of the plaintiff of his case as he had laid it."[1] The case of Stanwood *v.* Scovel, 4 Pick. 422, is similar both in facts and decision.

⁂

THE best definition of an indictment which the author has ever seen is that contained in the joint opinion of Lord Denman, at the time Attorney-General, and Sir William Horne, Solicitor-General: "The first principles of law require that the charge should be so preferred as to enable the court to see that the facts amount to a violation of the law, and the prisoner to understand what facts he is to answer or disprove."[2]

⁂

THE advice given by Lord Coke in his commentary upon Twyne's case in regard to "any gift of goods and chattels made in satisfaction of a debt" remains as good as ever, namely, "immediately after the gift take possession of them."

[1] Clayton, 115.

[2] Forsyth Constitutional Law, p. 458.

THE style of some of the old reporters is admirable. Clayton reports this case: "Trespass. Plaintiff declares that the defendant did break his close and eat his grass etc. cum averiis suis, to wit, oxen, sheep, hogs, avibus, anglice turkies. And the judge did hold that turkies are not comprised within the general word 'averia,' which is an old law word, and these fowls came but lately into England:[1] and upon this it was directed to sever the damages, for otherwise if the damages shall be joyntly given, and it be ill for this of the turkies, for the reason abovesaid, it will overthrow all the verdict."[2]

※

IN a recent case in Pennsylvania,[3] Mr. Justice Lewis thus discourses of a condition in a will in restraint of marriage: "The principle of reproduction stands next in importance to its elder-born correlative self-preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy the justice of expulsion from Paradise. It was impressed upon the human creation by a beneficent Providence, to multiply the images of himself, and thus to promote his own glory and the happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious

[1] Clayton's Reports were published in 1651.

[2] Usley's Case, p. 50.

[3] Commonwealth *v.* Stauffer, 10 Penn. State Rep. 355.

necessity to obey its mandates. From the lord of the forest to the monster of the deep, from the subtlety of the serpent to the innocence of the dove, from the celastic embrace of the mountain kalmia to the descending fructification of the lily of the plain, all Nature bows submissively to this primeval law. Even the flowers which perfume the air with their fragrance, and decorate the forests and fields with their hues, are but 'curtains to the nuptial bed.' The principles of morality, the policy of the nation, the doctrines of the common law, the law of nature and the law of God, unite in condemning as void the condition attempted to be imposed upon his widow."

⁂

MR. RICHARD WEST, afterwards Lord Chancellor of Ireland, gave a pithy opinion "On the Common and Statute Law applicable to the Colonies," concluding, "Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear."[1]

⁂

IN some copies of the Second Part of Brownlow's Reports there is a peculiar Preface, in others it is omitted; the reader may perhaps think it might as well have been omitted in all.

[1] Forsyth Constitutional Law, p. 1.

THE common law contains a general definition of forgery; but the statute law has specified so many varieties of forgery that the offence at common law has been nearly superseded. Indeed, it would require great ingenuity to commit it without committing, at the same time, a statutory offence. The problem was perhaps solved by a man who painted the name of an eminent artist in the corner of a picture, in imitation of the original, in order to pass it off as an original picture by that artist. A case was reserved to determine whether the solution was sound. It was decided that he was not guilty of forgery.[1]

The drawer of a check on a bank which was duly honored and returned to him by the bank, afterwards altered his signature in order to give it the appearance of forgery, and to defraud the bank and cause the payee of the check to be charged with forgery. The Court of Queen's Bench were of opinion that inasmuch as the alteration did not alter the legal effect of the document it did not amount to a forgery.[2]

※

PROFESSIONAL law-books are not generally esteemed as light reading. Ménage wrote a book on the amenities of the Civil Law, which does anything but fulfil its promise.[3]

[1] Regina v. Closs, Dearsly & Bell C. C. 460.

[2] Britian v. Bank of London, 11 W. R. 569.

[3] Ménage (Gilles) Juris Civilis Amœnitates. Secunda editio. 8vo. Paris. 1677.

IN theory, the law looks upon the services of counsel as rendered gratuitously.[1] In practice, the client often takes the same view. Combine the two, and the profits arising from the practice of the law are easily computed. Compare Juvenal: —

> Dic igitur, quid causidicis civilia præstent
> Officia et magno comites in fasce libelli ?
> . . . . . Veram deprendere messem
> Si libet : hinc centum patrimonia causidicorum,
> Parte alia solum russati pone Lacernæ.
> Sat. VII. 106–114.

Well, tell me then, what do the services rendered their fellow-citizens, and their briefs they carry about with them in a big bundle, bring in to the lawyers ? . . . . But if you like to calculate the actual harvest they reap, set in one scale the estate of a hundred lawyers, and you may balance it on the other side with the single fortune of Lacerna, the charioteer of the Red.

⁂

A MAN grants all trees in such a close, excepting one plump of oaks being eight in number, and there were nine of them, and the grantee did cut them all down, and that plump among the rest, and holden the exception abovesaid not good for the variance, but all did pass.[2]

[1] Kennedy *v.* Broun, 10 C. B. N. S. 677. Lord Nottingham held it to be maintenance in a barrister to contract to be paid in the event of success. Penrice *v.* Parker, Cases Temp. Finch, 75.

[2] Clayton, 149.

IN actions for slander it has been at all times the custom to preface the legal enunciation of the plaintiff's case with a preliminary panegyric upon his character; this is superfluous, since it does not affect the gist of the action. In one instance, indeed, it appears that in an action for calling the plaintiff a common whore, the announcing herself to be of good fame and honest reputation tempted the defendant to plead that at the time of publishing the words she was not of an honest reputation; but the plea was held to be bad, since it answered matter of inducement which did not require any answer.[1] In a modern case, the plaintiff in an action for a libel imputing to him seditious principles prefaced his declaration with a boast of the uniform loyalty of his conduct; it appeared he had been some time in confinement under the sentence of the court, for publishing a seditious libel; Lord Ellenborough animadverted on the impropriety and absurdity of such a preamble.[2]

⁂

IT was held to be slanderous to say of a barrister that he could not make a lease; whereas it was not slanderous to say of an attorney that he made false writings, because it was not his business to make writings.[3]

[1] Strachy's Case, Style, 118.
[2] 1 Starkie on Slander, 357, 2d ed.
[3] 1 Rolle Ab. 54. Bac. Ab. Slander, B. 3.

CLAYTON, p. 34, reports this case: "The judge would not suffer a grand-juryman to be produced as a witness to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions. See, if a witness is questioned for a false oath to the grand jury, how it shall be proved if some of the jury be not sworn in such case;[1] and in a case between Hitch and Mallet such a case was about an oath made before a grand jury, quære What became of it?"

※

FOR saying to the plaintiff's wife these words, "You had a bastard in London, and go thither and have another," and the judge held the action would not lie: but see because of the variance which may be in such case between the husband and his wife, which is damage etc.[2]

※

AN attorney cannot act on both sides, even with the consent of the parties.[3] The court committed an attorney to the Fleet, and struck him off the roll, for accepting a retainer on both sides.[4]

[1] "Some of the jury" shall be "sworn in such case." Commonwealth v. Mead, 12 Gray, 167.

[2] Clayton, 73.

[3] Anon. 7 Mod. 47.

[4] Simon Mason's Case, Freeman, 74.

IN Hilton *v.* Eckersley,[1] the sole point was one purely of political economy, arising out of the Combination Laws. Some Lancashire mill-owners entered into a counter-combination against their men (who had combined to force their masters to yield to certain terms) not to open their mills for twelve months except on terms agreed to by the majority of such mill-owners. Whether this agreement of the masters was valid, was the subject of elaborate discussions in the Court of Queen's Bench, and the Court of Error. "I enter on such considerations," said Lord Campbell in delivering his judgment, "with much reluctance and apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion on questions of political economy, and other topics connected with the adjudication of such cases." The court held the agreement void, as contrary to public policy, in restraint of trade, and the free action of individuals; and the judgment was confirmed unanimously by a Court of Error. Compare this decision, says a very recent writer, and the enlightened principles on which the discussion was conducted, with the state of things existing formerly in the Legislature and on the Bench, as evidenced by the following passage in Lord Coke's Third Institute. Speaking of such "new manufacture as deserves a privilege," he proceeds: "There was a new invention found out here-

[1] 6 El. & Bl. 47. 24 L. J. N S. Q. B. 352. 25 L. J. N. S. Q. B. 199.

tofore, that bonnets and caps might be thickened in a fulling-mill, by which means more might be thickened and fulled in one day than by the labors of fourscore men, who got their livings by it: It was ordained, *that bonnets and caps should be thickened and fulled by the strength of men, and not in a fulling-mill: for it was holden inconvenient to turn so many laboring men to idleness.*"

⁂

"LAW CASES. Special and Selected Law Cases, concerning the Persons and Estates of *all Men whatsoever;* collected out of the Reports and Year-Books of the Common Law of England. 4to. London: 1641." "The title of this book," writes Mr. Wallace, "certainly operates by way of *enlargement.*"

⁂

THERE is no court equal to the trial of the superior judges of the realm for facts done in judicature.[1] If judges in any court, said Lord Robertson,[2] were liable to be called to an account for words spoken in their judicial capacity, it may be said, in the words of Lord Stair, "No man but a beggar or a fool would be a judge."

[1] Argument for the defendant in error in Johnstone *v.* Sutton, 1 T R. p 535. See Randall *v.* Brigham, 7 Wallace, p. 535.

[2] Miller *v.* Hope, 2 Shaw Appeal Cases, p. 134.

WHEN a verdict of guilty had been given against Lord Stafford, Lord Chanceller Nottingham, Lord High Steward, proceeded to pass sentence (according to the expression of Evelyn, who was present) "with greate solemnity and dreadful gravity." Lord Stafford then begged that he might no longer be kept a close prisoner as he had long been, and that his wife and children might be admitted to see him until his death.

LORD HIGH STEWARD. — "My Lord Stafford, I believe I may with my Lords' leave tell you one thing farther, that my Lords, as they proceed with rigour of justice, so they proceed with all the mercy and compassion that may be; and therefore my Lords will be humble suitors to the King, that he will remit all punishment *but the taking off your head.*" [1]

⁂

MR. WALLACE adverts to a ludicrous blunder of Mr. Justice the Honorable St. George Tucker, of the Supreme Court of Appeals of Virginia, who sets aside Lord Hardwicke's censure of "Reports Tempore Finch," and supposes that Lord Nottingham was actually the author.[2] "This book has indeed," he says, "been dishonored as one of no authority. Whether for want of the imprimatur of the Lord Chancellor and Judges, formerly prefixed to

[1] 7 Howell State Trials, 1217 - 1558.
[2] The Reporters 20, 3d ed.

books of Reports, I cannot tell. But the name of *Sir Heneage Finch, the author*, who is mentioned by Judge Blackstone as a person of the greatest abilities and most uncorrupted integrity, endued with a pervading genius, which enabled him to discover and pursue the true spirit of justice, may weigh against the opinion even of Lord Hardwicke, especially where this book is cited and relied on by other Judges."[1]

⁂

THE "Reports Temp. Finch" has been noted for a peculiarity, namely, that in all cases where the rule laid down or relied on by the judge differs from the corresponding rule of the Civil Law, the difference is noted in the margin.

⁂

SIR ROBERT FILMER published an advertisement to the jurymen of England touching witches. In this he shows the difference between a Hebrew and an English witch, and proves that the Devil is the principal, and the witch only an accessory before the fact. Now an accessory cannot be convicted before the principal is tried or outlawed upon summons for nonappearance; he could not be tried by his peers, who, if they could, would never convict him; and by the rules of the common law the Devil could never be summoned nor outlawed, and therefore a witch could not be tried.

[1] Smith *v.* Chapman, 1 Hening & Munford, 293.

ON the trial of Horne Tooke, having objected to a particular piece of evidence, he was reminded by Chief Justice Eyre, that, if there were two or three links in the chain, they must go to one first, and then to another, and see whether they amounted to evidence. The defendant demurred to this.

HORNE TOOKE. — I beg your pardon, my Lord, but is not a chain composed of links, and may I not disjoin each link, and do not I thereby destroy the chain?

EYRE C. J. — I rather think not, till the links are put together, and form the chain.

HORNE TOOKE. — I rather think I may, because it is my business to prevent the forming of that chain!

⁂

IT was not until 1695 that a statute was passed in England, which provided, among other things, that any person on trial for high treason "shall be received and admitted to make his full defence by counsel learned in the law." The first instance on record in which we find counsel assigned under this statute is on the trial of Rookwood and others, on which occasion Sir Bartholomew Shower and Mr. Phipps defended the prisoners; and it is curious to observe in what deprecatory terms they separated themselves from their clients. "My Lord," said Sir Bartholomew, addressing Chief Justice Holt, "we are assigned of counsel in pursuance of an Act of Parliament, and we hope that nothing which we shall say

in defence of our clients shall be imputed to ourselves. I thought it would have been a reflection upon the government and your lordship's justice, if, being assigned, we should have refused to appear: it would have been a publication to the world that we distrusted your candor towards us in our future practice upon other occasions. . . . . We come not here to countenance the practices for which the prisoners stand accused, nor the principles upon which such practices may be presumed to be founded; for we know of none, either religious or civil, that can warrant or excuse them."[1] A cold exordium for the speech of an advocate!

⁂

AN imperative rule of pleading is thus tersely expressed: "An indictment ought to be certain to every intent, and without any intendment to the contrary."[2] The charge must be sufficiently explicit to support itself; there is no latitude of intention to include anything more than is charged.[3]

⁂

MR. JUSTICE MAULE observed that a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages.[4]

[1] 13 Howell State Trials, 145.
[2] Cro. Eliz. 490.
[3] 2 Burr. 1127.
[4] Canham *v.* Barry, 15 C. B. p. 619. Quoted in the judgment in Baily *v.* Crespigny, Law Rep. 4 Q. B. p. 185, and 10 Best & Smith, p. 11.

WE give a few cases decided in the Star-Chamber. They are probably quite as valuable as a vast number of the modern decisions, and are certainly shorter and more entertaining. This court has everywhere of late times, and nowhere more than in our own Republican country, been the subject of unbounded abuse. Certainly it would be a curious thing to inquire how a tribunal composed of such men as it was — that is to say, of men like Coke, and Bacon, and Hobart, and Crewe, and Laud, and Yelverton — should have so utterly failed to commend their administration of justice to either their own or to any other day or land. Indeed, when we see what men filled the offices which are named in the statute constituting this court, it is impossible to conceive of a tribunal better able to discharge, or more certain to discharge with integrity, with justice, with decorum, with every sentiment of respect for the living and the dead, with all the regards that were due to the accused and the accuser, and with the many exquisite social considerations which the honor, the offices, and dignity of the persons frequently before it required at their hand, than a tribunal thus ordained; and that its deliberations were not with open doors, and that its powers were almost, in fact, unlimited, were reasons, one might say, a priori, why its judgments should give the nation satisfaction.

This particular topic — the degeneration of the Star-Chamber — itself makes a curiosity of the law;

and as much, perhaps, of the Bigarrures de l'Esprit Humain. It is one on which either Buckle or Scarron could exhaust their powers. We give a few cases, all of them from Hobart's Reports. As we read them, one cannot help thinking that Lords Bacon and Yelverton (whom Bacon styled a man of "*very* good parts," which made acquaintance between them on "first sight"), and other of the bright geniuses who adorned that age and court, must have been extremely amused at the questions which came occasionally before their consideration.

"The Lady Arabella," mentioned in the Countess of Shrewsbury's Case, which is one of those we give, was of course the Lady Arabella Stuart, and the "supposed child" was necessarily a matter of vast curiosity to the women, as well as of the most well-founded anxiety to the graver part of the nation, as involving directly the heirship of the Stuarts to the throne. Our ideas of the chivalrous notions of the Star-Chamber receive a sad abatement from one of the cases we present (Tufton *v.* Nevill), in which the court, while deciding that so delicate a matter as solicitation of chastity is not examinable even by *it*, yet intimates, most ungallantly, that a man, if compelled to answer on oath, might criminate a lady's virtue where he himself had been gratified by her regards. Very different was Sir Thomas Erskine's opinion, as will be recalled by every one familiar with his brilliant and beautiful speeches.

Lord Darcy *v.* Markham.[1]

The Lord Darcy of the north sued Gervase Markham, esquire, in the Star-Chamber, and the case fell out to be thus: that they had hunted together, and the defendant and a servant of the plaintiff, one Beckwith, fell together by the ears in the field, and Beckwith threw him down and was upon him cuffing of him, and the Lord Darcy took him off and reproved his servant, and yet Markham chid him, charging him with maintaining his man. And the Lord Darcy replied, that he had used him kindly, for if he had not rescued him from his man, he had beaten him to rags. Whereupon Markham wrote five or six letters to the Lord Darcy, and subscribed them with his name, but sent them not, but dispersed them unsealed in the fields, whereof the effect was, that whereas the Lord Darcy had said, that but for him his man Beckwith had beat him to rags, he lied, and that he would maintain with his life; and then said, that he had dispersed those letters that he might find them, or somebody else might bring them to him; and concluded that if he were desirous to speak with him, that he should send his boy, and he should be well used. This cause was effectually handled at the common law, not enforced by the King's proclamation, because the defendant had no knowledge of the proclamation, nor by likelihood could have, it was so soon after the proclamation. But the plaintiff's

[1] Hobart, 120.

counsel, by direction of the court, left the proclamation, and yet Markham was censured and fined £ 500. The reason of the sentence was, that this was a compounded misdemeanor, for the letter thus dispersed was in the nature of a libel, slanderous and defamatory to my Lord Darcy; and the other point was, that though there were no direct challenge to my Lord Darcy to fight, yet there were plain provocations to it, and, as it were, to call and challenge my Lord Darcy to fight him. And though the case was something aggravated, that it was to a peer of the realm, yet the censuring of the fact rose out of the nature of it, and not out of the circumstances of the person.

MARSHALL *v.* STEWARD.[1]

MARSHALL brought an action of the case against Steward, reciting the statute of 1 Jac. of invocation of foul spirits, (which was needless,) for speaking these words unto him: "The devil appears unto thee every night in the likeness of a black man, riding upon a black horse, and thou conferrest with him, and whatsoever thou dost ask him he doth give it thee, and that is the reason thou hast so much money." And after a verdict finding the words, the court gave judgment for the plaintiff.

WRENHAM'S CASE.[2]

YELVERTON, attorney-general, informed in the Star-Chamber, ore tenus, against John Wrenham, for a

[1] Hobart, 129. [2] Hobart, 220.

complaint by him exhibited against Sir Francis Bacon, Lord Chancellor, to the King, in a book containing a scandalous censure of a decree made by the said Lord Chancellor against him, for one Sir Edward Fisher. In the sentencing of which case it was resolved by the whole court that it was lawful for any subject to petition the King for redress, in an humble and modest manner, where he finds himself grieved by a sentence or judgment, — for access to the sovereign must not be shut up in case of the subject's distresses; but on the other side, it is not permitted, under color of a petition and refuge to the King, to rail upon the judge or his sentence, and to make himself judge in his own cause, by prejudging it before the rehearing (for which his suit to the King should be), which Wrenham in this case did, through his whole book, with the most desperate boldness and despiteful and virulent words that was possible. It was also resolved, that the injustice of the decree was not to be questioned in this case; for that was not the point now examinable; though in that it did appear that he had done my Lord Chancellor much and great wrong. So he was censured a thousand pounds fine.

TUFTON *v.* NEVILL.[1]

SIR HUMPHREY TUFTON exhibited a bill etc. against Master Christopher Nevill, son to the Lord Aburga-

[1] Hobart, 195.

venny, for a riot, and laid by way of inducement, that Nevill had solicited his wife to inchastity both before and since his marriage with her; and that this being made known unto him by his wife, he caused her to write letters to the defendant, giving him hope of her inclination, and appointing him a time by night, and place; at which the defendant coming, (and the plaintiff, with a man disguised like a woman being there expecting as much,) the defendant and others in this company made a riot upon him and his company.

To this the defendant, as to the riot *answered;* but as to the solicitation of the lady's chastity *demurred.*

Whereupon, motion being made in court, though there were some of another mind, yet it was RESOLVED and RULED that the defendant's demurrer was good; and though it was urged that this inducement served very much both to aggravate the defendant's riot and to justify the plaintiff's train, yet the point of itself was naturally of another jurisdiction, and for the spiritual, whose proceeding in this case was not to be usurped nor prevented. Besides, the fault of solicitation is of so uncertain acceptation, as is not fit to be here examined. And, lastly, to examine such a fault by the oath of the delinquent is not allowable by us, being a delict that *we* cannot censure. And it may prove scandalous in the event if the defendant should upon his oath (which were in him excusable if the court should *constrain* his answer)

criminate the lady, were it true or false; for that could never be satisfied, being a point so secret as solicitation only.

Hicks's Case.[1]

One sent a letter closed and sealed up to Sir Baptist Hicks, which was so delivered to his hands, containing many despiteful scandals delivered ironice, as saying, "You will not play the Jew nor the hypocrite," and in that sort taunting him for an almshouse, and certain good works that he had done; all which he charged him to do for vainglory. Whereupon Sir Baptist Hicks sued him in the Star-Chamber. And now upon the hearing it was resolved, that, though it were not proved that the defendant had any way published it, yet the court would hold plea of it, and so did, and fined the defendant, and sentenced him to wear papers, and to make his submission to Sir Baptist Hicks in Cheapside. Yet an action of the case will not lie in that case, for want of publication; but the King and Commonwealth are interested in it, because it is a provocation to a challenge, and breach of the peace.

Countess of Shrewsbury's Case.[2]

The Countess of Shrewsbury was fined ten thousand pounds and committed to the Tower, for that, being called to the Council Table and interrogated what she

[1] Hobart, 215.

[2] Hobart, 235.

knew, *or had heard or thought*, of a supposed child which it was rumored that Lady Arabella should have had, she refused, obstinately, to make any answer, for it was judged that this was a question of State. For there is not one thing that doth more concern the peace of a kingdom than the certainty of the royal line; insomuch as suppositious persons have raised as great commotions and troubles in States as the discords of true heirs and descendants, — as in the case of Perkin Warbeck, he at home; and counterfeit Sebastian of Portugal, and many others. . . . . The lady was the more pressed to answer this matter, because, being more familiar and inward with the Lady Arabella than any other, she must needs have falsified the rumor; *for all men of understanding held it to be untrue.*

Traske's Case.[1]

One John Traske, a minister that held opinion that the *Jewish* Sabbath ought to be observed, and not *ours*, and that we ought to abstain from all manner of swine's flesh; being examined upon these things, he confessed that he had divulged these opinions and had labored to bring as many to his opinion as he could; and had also written a letter to the King wherein he did seem to tax his Majesty of hypocrisy, and did expressly inveigh against the Bishop's High Commissioners as bloody and cruel in their proceed-

[1] Hobart, 236.

ings against him and a papal clergy. Now he being called ore tenus, was sentenced to fine and imprisonment — not for holding these opinions, for these were examinable in the Ecclesiastical Courts, and not here, but — for making of conventicles and factions by that means, which may tend to sedition and commotion, and for scandalizing the King, the bishops, and the clergy.

Countess of Exeter *v.* Lady Ross.[1]

In the great cause between the Countess of Exeter, the Lady Ross, and others, because the Lady Ross and one Sarah Swarton, her maid, had charged the Countess of Exeter, that she had delivered unto the said Lady Ross at Wimbleton, at the Earl's house, in a certain chamber there, a paper written and signed by herself (as she said), containing a confession of certain foul faults, and a submission thereupon, which was showed unto the King; his Majesty commanded Serjeant Crew and the Serjeant Moore, of counsel of either side, to go to Wimbleton, and there, in the same chamber, to examine the Lady Ross and Swarton, upon all such things as, upon their view of the place, they might judge likely to discover the truth or falsehood of the same matter; which they did accordingly, without oath. Now the same persons being afterwards examined in court as defendants, upon all things that the plaintiffs listed; they did further

[1] Hobart, 236.

examine them upon interrogatories, whether that declaration which they had made at Wimbleton before the two serjeants were true or not; but they did not show them that declaration now; whereupon they answered that they were true.

Now, upon motion in open court, it was resolved that these examinations were not well taken; for no man is bound by an examination in court, till first he have advisedly read, perused, and corrected it, as he sees cause, and then finally concluded it. Therefore, this being first taken without oath, there was no reason to bind them to it by a new oath by memory without review, and therefore by order it was suppressed. Nevertheless, because it was like that the said examination might serve the better to discover truth, it was ordered that the same their declarations should be showed them, and they re-examined upon them. And so they were.

*

STAR-CHAMBER CASES. We print a few cases from this scarce volume. Their brevity is certainly commendable.

"Note that one G. writes his letter to a juror to appear between L. and C. D. and to do his conscience, and he was fined at twenty pounds here, because he had nothing to do in the matter, circa 27 Eliz. Here note that no man ought to meddle in any matter depending in suit where he hath nothing to do."

"One L. O. of Kent was punished in the court for

falsely going about to prove one that was his cousin or brother to be a traitor, and for this he was adjudged to ride about Westminster Hall with his face to the horse-tail, circa 27 Eliz. as I heard."

"Note that one S. of the county of Lancaster for falsely procuring one to be indicted for the death of another, was fined in this court to a great sum, circa 31 Eliz."

"A Knight of the county of Northumberland was fined in a great sum in the Star-Chamber, because he permitted a seditious book called Martin Marprelate to be printed in his house, 32 Eliz."

"One writes to a justice of the peace to send him his warrant with a blank, to put in one he would attach upon a suspicion of felony, and so the justice did, and because he sent his warrant with a blank to put in the name of one he knew not, neither the matter, before the making of his warrant, he was fined in this court, circa 30 Eliz.; and it was one Sir J. R."

"A woman great with child, which was suspected of incontinency without cause, was commanded to be whipped in Bridewell, London, by the Masters there; and because she fell to travail before her time etc. they were for this fined in this court at a great sum. And by order of the court it was awarded that they should pay a certain sum to the said woman, about the 31 of Eliz. See the proceedings there concerning this matter the year aforesaid, set down more at large."

"A justice of the peace was put out of commission

by order of this court, for because he refused to take the peace of one who came to him, and offered him surety for the peace, because the justice which did award the warrant was not his friend, for which reason he refused to go before him to be bound to the peace."

※

IN a recent case in the Supreme Court of the United States, the whole business of making hats, from the disintegrating of the fur to the production of a hat-body, was actually carried on and exhibited in the court-room; and the printed *argument* of counsel contained, as "exhibits," the skin of the beaver as it comes from the animal, with specimens of fur as thus exhibited, and also as exhibited in various conditions and processes, down to the very surface of the "brush" and "napped" hats. "No similar argument," says the reporter, "perhaps, was ever made in any court of law; nor could a case be explained in a manner more satisfactory."[1]

※

MR. JUSTICE PUTNAM thus spoke of the power of compression and discrimination of Chief Justice Parsons: "As light and spongy fabrics are reduced to portable size by hydraulic pressure, so the verbose readings of the law were, by the force of his great mind, reduced to clear, practical rules."[2]

[1] Burr *v.* Duryee, 1 Wallace, 531.

[2] Deblois *v.* Ocean Insurance Co., 16 Pick. p. 310.

UPON the hearing of a petition before Vice-Chancellor Kindersley, the death of Lord Byron, the poet, was a material fact in the petitioner's title; but it being assumed that the court would take judicial notice of a fact which was well known to the whole world, no evidence was adduced upon the subject.[1] Counsel observed that his lordship having died in Greece, there would probably be some difficulty in obtaining the kind of evidence which the court ordinarily required. The Vice-Chancellor, however, declined to make the order, except upon the production of the usual evidence, for which purpose the petition stood over. This is a curious instance of adherence to a strict general rule of evidence, and the more so as the close connection between the families of the Vice-Chancellor and the poet might be supposed to give the court additional reason for dispensing with evidence of a fact which is a part of the history of the world.

*

A LUDICROUS attempt was made in a recent case[2] to fabricate a consideration. A father held a promissory note of his son, who had teased him with complaints of not having received so much money or so many advantages from his father as his other children, as, it was alleged, the father had admitted;

[1] The hearing was in 1862. Lord Byron died in 1824.

[2] White *v.* Bluett, 23 L. J. N. S. Exch. 36.

and that he had agreed, that, if his son would cease forever to make such complaints, he should be absolved from payment of the note. The father died, and his executor, finding the note among the testator's papers, sued the son upon it at law; and he pleaded the facts as an answer to the action. The plea was demurred to as showing no consideration; and the son's counsel endeavored to support his case by alleging that he had a right to make the complaints alleged, and had subjected himself to a *detriment*, by not being able to continue his ill-founded complaints! The court contemptuously dismissed the plea. Baron Parke sarcastically asked, "Is an agreement by a father, in consideration that his son will not *bore* him, a binding contract? "By the argument," said the Lord Chief Baron, "a principle is pressed to an absurdity, as a bubble is blown until it bursts. . . . . Looking at the words merely, there is some foundation for the argument; and following the words only, the conclusion may be arrived at. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no *consideration*."

※

IN "Star-Chamber Cases," perjury, more quaintly than accurately, is thus defined: "Perjury is a lie confirmed by oath."

THE following are specimens of the legal nomenclature of Westminster Hall.

"In fermedon the tenant having demanded a view after a general imparlance, the demandant issued a writ of petit cape — held irregular."

Also: "If, after nulla bona returned, a testatum be entered upon the roll, quod devastavit, a writ of inquiry shall be directed to the sheriff, and if by inquisition the devastavit be found and returned, there shall be a scire facias quare executio non de propriis bonis, and if upon that the sheriff returns scire feci, the executor or administrator may appear and traverse the inquisition."

Again: "If the record of Nisi prius be a die Sancti Trinitatis in tres Septimanas nisi a 27 June, prius venerit, which is the day after the day in Bank, which was mistaken for a die Sancti Michaelis, it shall not be amended."

⁂

IT is curious to observe how bitter a prejudice Themis has against her own humbler ministers. Most of the bitterest legal jokes are at the expense of the class who have to carry the law into effect. Take, for instance, the case of the bailiff who had been compelled to swallow a writ, and, rushing into Lord Norbury's court to proclaim the indignity done to justice in his person, was met by the expression of a hope that the writ was "*not returnable* in this court."

THERE are two old methods of paying rent in Scotland, — kane and carriages; the one being rent in kind from the farm-yard, the other being an obligation to furnish the landlord with a certain amount of carriage, or rather cartage. In one of the vexed cases of domicile, which had found its way into the House of Lords, a Scotch lawyer argued that a landed gentleman had shown his determination to abandon his residence in Scotland by having given up his "kane and carriages." It is said that the argument went further than he expected, — the English lawyers admitting that it was indeed very strong evidence of an intended change of domicile when the laird not only ceased to keep a carriage, but actually divested himself of his walking-cane.

⁂

LUTWYCHE'S REPORTS were edited in 1718 by W. Nelson. In the Preface this whimsical annotator, speaking of the subtlety and obscurity with which the science of pleading was invested, observes: "Here we may see what artificial fencing there is between replications and rejoinders, till an end is put to the strife by some general or special demurrer, — and abundance more of such cobweb subtleties, spun so very fine by the spiders of the law, that one would think it done on purpose to let justice fall through."

ON the supposition that there are few readers who, like Lord King, can boast of having read the Statutes at Large through, we venture to give a title of an Act — a title only, remember, of one of the bundle of acts passed in one session — as an instance of the comprehensiveness of English statute law, and the lively way in which it skips from one subject to another. It is entitled —

"An Act to continue several laws for the better regulating of pilots, for the conducting of ships and vessels from Dover, Deal, and the Isle of Thanet, up the River Thames and Medway; and for the permitting rum or spirits of the British sugar plantations to be landed before the duties of excise are paid thereon; and to continue and amend an Act for preventing fraud in the admeasurement of coals within the city and liberties of Westminster, and several parishes near thereunto; and to continue several laws for preventing exactions of occupiers of locks and wears upon the River Thames westward; and for ascertaining the rates of water-carriage upon the said river; and for the better regulation and government of seamen in the merchant service; and also to amend so much of an Act made during the reign of King George I. as relates to the better preservation of salmon in the River Ribble; and to regulate fees in trials and assizes at nisi prius" etc. But this gets tiresome, and we are only half-way through the title after all. If the reader wants the rest of it, as also

the substantial Act itself, whereof it is the title, let him turn to the 23d of Geo. II. ch. 26.

No wonder, if he anticipated this sort of thing, that Bacon should have commended "the excellent brevity of the old Scots acts." Here, for instance, is a specimen, an actual statute at large, such as they were in those pygmy days: —

"Item, it is statute that gif onie of the King's lieges passes in England, and resides and remains there against the King's will, he shall be halden as Traiter to the King."

Here is another, very comprehensive, and worth a little library of modern statute-books, if it was duly enforced: —

"Item, it is statute and ordained, that all our Sovereign lord's lieges being under his obeisance, and especially the Isles, be ruled by our Sovereign lord's own laws, and the common laws of the realm, and none other laws."

⁂

"DESCENDERE, to descend or to spring of one's body; hereupon they which are born of us are called by the name of descendants, which with them that ascend make the right line, and the ascendants and descendants cannot marry together, wherefore, if Adam were now living, he could not marry a wife."[1]

[1] Fulbecke Study of the Laws, p. 203.

ON the trial of the Seven Bishops, during the argument of the Solicitor-General who was of counsel for the King, Mr. Justice Powell observed to the Lord Chief Justice, "My Lord, this is wide. Mr. Solicitor would impose upon us: let him make it out, if he can, that the King has such a power, and answer the objections made by the defendants' counsel." Lord Chief Justice: "Brother, impose upon us! He shall not impose upon me; I know not what he may upon you; for my part, I do not believe one word he says."[1]

⁂

"THE law does not recognize the dreams, visions, or revelations of a woman in a mesmeric sleep as necessaries for a wife, for which the husband, without his consent, can be held to pay. These are fancy articles, which those who have money of their own to dispose of may purchase, if they think proper; but they are not necessaries, known to the law, for which the wife can pledge the credit of her absent husband."[2]

⁂

"I REMEMBER," writes Lambard," that, not many years since, women were punished in the Star-Chamber, and that worthily, for that, having put off their seemly shamefacedness and apparelling themselves in the attire of men, they assembled in great number, and riotously pulled down an enclosure."[3]

[1] 12 Howell State Trials, 183.

[2] Judgment in Wood v. O'Kelley, 8 Cush. p. 408.

[3] Eirenarcha, 179, A. D. 1581.

LORD DENMAN, delivering judgment in the House of Lords, in a celebrated case, took occasion to remark, that a large portion of the *legal opinion* which has passed current for law falls within the description of "law taken for granted"; and that, "when, in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine — the mere repetition of the *cantilena* of lawyers — cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."[1]

⁂

IN a recent case in Indiana, after the jury had retired to deliberate upon their verdict, the bailiff, without the consent of the defendant, or the leave of the court, furnished to them, at their request, a volume of Bishop's Criminal Law. This was held to be misconduct, both on the part of the officer and the jury, and such as to entitle the defendant to a new trial.[2]

⁂

GODBOLT reports a case in which Chief Justice Belknap lays down a certain proposition which "he swore to be law."[3]

[1] O'Connell *v.* The Queen, 11 Clark & Finnelly, p. 373 And see per Pollock C. B. 2 H & N. 139.

[2] Newkirk *v.* The State, 27 Indiana, 1.

[3] Godbolt, p. 34.

DISSENTING opinion of Mr. Justice Livingston in Pierson *v.* Post:[1] —

"My opinion differs from that of the court. Of six exceptions taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

"Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

"This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal the correction of any mistake which we may be so

[1] 3 Caines, 175, 180.

unfortunate as to make. By the pleadings it is admitted that a fox is a 'wild and noxious beast.' Both parties have regarded him, as the law of nations does a pirate, 'hostem humani generis,' and although 'de mortuis nil nisi bonum' be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barnyards have not been forgotten; and to put him to death wherever found is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal so cunning and ruthless in his career. But who would keep a pack of hounds? or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, 'sub jove frigido,' or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his Code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this

cause, 'with hounds and dogs to find, start, pursue, hunt, and chase' these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his Institutes would have taken care not to pass it by without suitable encouragement. If anything, therefore, in the Digests or Pandects shall appear to militate against the defendant in error, who on this occasion was the fox-hunter, we have only to say tempora mutantur; and if men themselves change with the times, why should not laws also undergo an alteration?

"It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favored us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of Barbeyrac as the most rational, and least liable to objec-

tion. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained that if a beast be followed with large dogs and hounds, he shall belong to the hunter, not to the chance occupant; and in like manner if he be killed or wounded with a lance or sword; but if chased with beagles only, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

"Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals feræ naturæ may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking what he has thus discovered an intention of converting to his own use.

"When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a

beast so pernicious and incorrigible, we cannot greatly err in saying that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession or bodily seisin, confers such a right to the object of it, as to make any one a wrong-doer who shall interfere and shoulder the spoil."

⁂

THE following case is curiously suggestive of the state of the country round London in the days when much business was done on the road:[1] A bill in the Exchequer was brought by Everett against a certain Williams, setting forth that the complainant was skilled in dealing in certain commodities, "such as plate, rings, watches etc.," and that the defendant desired to enter into partnership with him. They entered into partnership accordingly, and it was agreed that they should provide the necessary plant for the business of the firm — such as horses, saddles, bridles etc. (pistols not mentioned) — and should participate in the expenses of the road. The declaration then proceeds, "And your orator and the said Joseph Williams proceeded jointly with good success in the said business on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the said Joseph Williams told your orator that Finchley in the county of Middlesex was a good and convenient place to deal in, and that commodities

[1] The Book-Hunter, p. 138.

were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which, he believed, might be had for little or no money; that they accordingly went, and met with the said gentleman, and, after some small discourse, they dealt for the said horse etc. That your orator and the said Joseph Williams continued their joint dealings together in several places — viz., at Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere — to the amount of £2,000 and upwards." [1]

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AN action was tried before Lord Holt on a wager whether a person playing at backgammon, having stirred one of his men without moving it from the point, was bound to play it, and that venerable judge called in the assistance of the groom porter to decide the controversy.[2]

[1] This case has been often referred to in law-books, but I have never met with so full a statement of the contents of the declaration as in the Retrospective Review, Vol. V. p. 81.

[2] Pope *v.* St. Leger, 1 Salk. 344.

LORD RAYMOND thus concludes the report of a celebrated case: "Note, that this judgment was very distasteful to some Lords; and therefore the Lord Chief Justice Holt was summoned to give his reasons of this judgment to the House of Peers, and a committee was appointed to hear and report them to the House, of which the Earl of Rochester was chairman. But the Chief Justice Holt refused to give them in so extrajudicial a manner. But he said that if the record was removed before the Peers by error, so that it came judicially before them, he would give his reasons very willingly; but if he gave them in this case, it would be of very ill consequence to all judges hereafter, in all cases. At which answer some Lords were so offended that they would have committed the Chief Justice to the Tower. But, notwithstanding, all their endeavors vanished in smoke." [1]

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THE bar and the public would be astonished, at the present day, to hear one of the learned judges of the Court of Queen's Bench, in giving judgment in some important case, pursue a line of observation similar to that which we find in the decision of that court in a once celebrated case.[2] Mr. Justice Catline, speaking of a fine, levied in pursuance of the 4 Henry VII., compared it to "Janus, who, he said, was Noah, but the Romans *occasionally* called him Janus, and used to paint him

[1] 1 Ld. Raym. 10, 18.

[2] Stowe v. Lord Zouch, Plowden, 353.

with two faces, — one looking backwards, in respect that he had seen the former world, which was lost by the flood, and the other looking forwards, — for which reason they called him Janus bifrons. And also he carried a key in his hand, his power to renew the new world by his generation. *So* here the act creates, as it were, a flood, by which all former rights before the fine shall be drowned by non-claim, for non-claim is the flood, and the fine begets a new generation, which is the new right, for the fine makes a new right and is the beginning of a new world, which proceeds from the time of the fine downwards."

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IN Mr. Bishop's excellent book on Criminal Procedure [1] is this passage: —

"What the lawyers of our day most need, while descending from the clear heights of legal principle to the vale below on a fast-whirling avalanche of decisions, is to be made cognizant, before it is too late, of the *law of the motion* of the avalanche, in order to strike uppermost when it breaks, instead of being crushed and ground to powder beneath. Unhappily, most do not perceive, at present, that the avalanche is ever to break, or ever to stop, or ever to turn. If Scripture might be quoted in a law-book, the author would say: 'He that hath an ear to hear, let him hear.' This hint is meant to be read only by those who have ears."

[1] Vol. II. § 413.

IT is a remarkable thing that a man should be sentenced "to stand in the pillory, lose his ears, pay a fine of £5,000 and be perpetually imprisoned in a distant fortress," and become one of the chief causes of great civil wars, on account of an unfortunate word or two in the last page of a book containing more than a thousand. It was as far down in his very index as "W" that the great offence in Prynne's Histrio Mastyx was found, under the head "Women actors notorious whores."[1] It was a very odd compliment to Queen Henrietta Maria to presume that these words must refer to her. The Histrio Mastyx was, in fact, so big and so complex a thicket of confusion, that it had been licensed without examination by the licenser, who perhaps trusted that the world would have as little inclination to peruse it as he had. The calamitous discovery of the sting in the tail must surely have been made by a Hebrew or an Oriental student, who mechanically looked for the commencement of the Histrio Mastyx where he would have looked for that of a Hebrew Bible. Successive licensers had given the work a sort of go-by, but, reversing the order of the sibylline books, it became always larger and larger, until it found a licenser who, with the notion that he "must put a stop to this," passed it without examination. It got a good deal of reading immediately afterwards, especially from Attorney-General Noy, who asked the Star-

[1] 3 Howell State Trials, 725.

Chamber what it had to do with the immorality of stage-plays to exclaim that church-music is not the noise of men, but rather "a bleating of brute beasts, — choristers bellow the tenor as it were oxen, bark a counterpoint as a kennel of dogs, roar out a treble like a set of bulls, grunt out a bass as it were a number of hogs." But Mr. Attorney took surely a more nice distinction when he made a charge against the author in these terms: "All stage-players he terms them rogues: in this he doth falsify the very Act of Parliament; for *unless they go abroad*, they are not rogues."

⁂

BY St. 1 Car. I. ch. 1, no persons shall assemble, out of their own parishes, for any *sport* whatsoever, on Sunday; nor, in their parishes, shall use any *bull or bear baiting*, interludes, plays, or other unlawful exercises or pastimes. "The Puritans hated bear-baiting," wrote Macaulay, "not because it gave pain to the bear, but because it gave pleasure to the spectators." [1]

⁂

IN Chudleigh's Case one of the judges drew a parallel between Nebuchadnezzar's tree and the Statute of Uses.[2]

[1] History of England, Vol. I. ch. 2. Even bear-baiting was esteemed heathenish and unchristian; the sport of it, not the inhumanity, gave offence. Hume History of England, Vol. I. ch. 62.

[2] 1 Rep. 1346.

AT the commencement of the reign of Edward VI. an act was passed from which no very favorable inference can be drawn as to the morals, habits, or accomplishments of the English nobility in the middle of the sixteenth century. Housebreaking by day or by night, highway robbery, horse-stealing, and the felonious taking of goods from a church, having been made capital offences, it was provided "that any Lord or Lords of the Parliament (to include Archbishops and Bishops), and any Peer or Peers of the realm having place and voice in Parliament, being convicted of any of the said offences for the first time, upon his or their request or prayer, *though he cannot read*, be allowed benefit of clergy, and be discharged without any burning in the hand, loss of inheritance, or corruption of blood." It seems strange to us, says Lord Campbell, that this privilege of peerage should have been desirable, or should have been conceded; but it continued in force till taken away by an act passed after the trial of Lord Cardigan in the reign of Queen Victoria.[1]

⁂

ONE was ordered by the judge of assize to be hanged in chains; the officer hung him in privato solo; the owner brought trespass; and upon not guilty the jury found for the defendant, and the court would not grant a new trial, it being done for

[1] Lord Campbell Lives of the Chancellors, Vol II. p. 169.

convenience of place, and not to affront the owner.[1] Holt Chief Justice: "If a man be hung in chains upon my land, after the body is consumed, I shall have gibbet and chain."[2]

⁂

MR. JUSTICE REDFIELD thus speaks of the celebrated case of Cornfoot *v.* Fowke:[3] "This case is certainly a most remarkable instance of self-delusion, brought about by the severity of one's own discriminations. Lord Abinger, who dissented from the opinion of the majority of the judges, seems to have readily comprehended the delusion under which his brethren were laboring, as indeed he always did all intricacies of thought and language." And after stating the opinion of the majority of the court in Cornfoot *v.* Fowke, he continues: "One is almost compelled to doubt if indeed these men[4] can be serious. It almost strikes the mind as matter of mere badinage. It is scarcely surpassed, in its ethical or metaphysical acumen, by the sophistry of the ancient schoolmen, by which it was attempted to be proved, by syllogistic reasoning, that in a foot-race Hercules never could overtake the lobster."[5]

[1] Sparks *v.* Spicer, 2 Salk. 648.

[2] 1 Ld. Raym. 738.

[3] 6 M. & W. 358. This case, though questioned, has never been overruled.

[4] "These men" were Baron Rolfe, Baron Alderson, and Baron Parke.

[5] The learned judge probably had a dim recollection of the story of Achilles and the tortoise.

IN Fuller's "Worthies" are quaint descriptions of the "men of the law":—

COKE. — His most learned and laborious works on the laws will last to be admired by the judicious posterity whilst Fame hath a trumpet left her, and any breath to blow therein.

PLOWDEN. — How excellent a medley is made, when honesty and ability meet in a man of his profession!

ST. GERMAIN. — Reader, wipe thine eyes, and let mine smart, if thou readest not what richly deserves thine observation; seeing he was a person remarkable for his gentility, piety, chastity, charity, ability, industry, and vivacity. . . . . Witness his book called "The Doctor and Student," where the former vies divinity with the law of the latter.

⁂

IN Massachusetts it is still an open question, whether if a whale happened to be stranded on the shore on the Lord's day, it would be lawful to work on that day to capture him.[1] But it is settled that an averment that the defendant hoed "in his field" on the Lord's day is supported by evidence that on that day he hoed "in a field in a part of his garden."[2]

1 Commonwealth v. Sampson, 97 Mass. p. 410.
2 Commonwealth v. Josselyn, 97 Mass. 411.

IN Brownlow Redivivus, p. 505, there is a singular entry. The marginal note runs thus: "Count per la Coachmaker's Widow vers le Frenchhome. Eo quod defendens simul cum etc. in querentem insultum fecit, et ipsam intoxicavit, et ad lectum ei ignotum adduxit, et illam super lectum istum deposuit, et in isto lecto cum querenti contra voluntatem suam impudenter recubuit, et se intrusit."

⁂

RAITHBY'S Edition of Vernon's Reports. There is a famous dedication "with a double aspect," of this book to Lord Eldon, by the editor, who, after obtaining permission to dedicate it to him, and before the book was published, seeing his intended patron suddenly turned out of office, after some compliments to departing greatness, says, "but your felicity is that you contemplate in your successor (Lord Erskine) a person whose judgment will enable him to appreciate your merits, and whose talents have procured him a name among the eminent lawyers of his country."

⁂

VESEY JUNIOR. "I knew this gentleman well," says Lord Campbell. "When near eighty he was still called 'Vesey Junior,' to distinguish him from his father, 'Vesey Senior.'"

BRACTON accounts for the old rule of law, "that inheritance may literally descend, but not ascend," upon the principle of gravitation, — the bowl rolls down the hill, but never rolls up. Littleton thus explains the doctrine of "hotchpot": "It seemeth that this word 'hotch-pot' is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together."

⁂

AN old law-tract assumes to give in this simple language the origin of the tenancy by the law, or courtesy of England: "It was called the law of England because it was invented in England on behalf of poor gentlemen who married gentlewomen, and had nothing wherewith to support themselves after their wives' death."

⁂

FEW cases are more laughable than that which describes the arithmetical process by which Baron Perrot arrived at the value of certain conflicting evidence. "Gentlemen of the jury," this judge is reported to have said, in summing up the evidence in a trial where the witnesses had sworn with noble tenacity of purpose, "there are fifteen witnesses who swear that the watercourse used to flow in a ditch on the north side of the hedge. On the other hand, gentlemen, there are nine witnesses who swear that

the watercourse used to flow on the south side of the hedge. Now, gentlemen, if you subtract nine from fifteen, there remain six witnesses wholly uncontradicted; and I recommend you to give your verdict for the party who called those six witnesses."

⁂

A CERTAIN earl, having estates in Sussex, *Gloucester*, and elsewhere, gave instructions to his solicitor to prepare a will, which was, inter alia, to give to his surviving countess a life estate in his estates in Sussex and *Gloucester*. The solicitor prepared a written will, in conformity with his noble client's instructions, and laid it before, to be settled by, a no less eminent conveyancer than the late accomplished and learned Mr. Butler. In due time the will was returned by him; and, having been fairly copied out, was taken by the solicitor to his client to be executed, — the solicitor having also with him the abstract of the will as originally prepared. *This only*, and not the fair copy brought to be executed, was read; and as it represented that a life-estate had been given to the countess, in conformity with the earl's intention, as well in the *Gloucester*, as the Sussex estate, he executed his will, believing it to be in exact conformity with the abstract; and in that belief he died. But behold! it turned out that by some accident the word "Gloucester" had been struck out by the great conveyancer; and the person making the

fair copy of the will not only omitted the word "Gloucester," but changed the word "counties" into "county," doubtless conceiving that he thereby carried out precisely the intention apparent in the draught! Thus the will was a total blank as to the Gloucester estate, which was worth nearly £14,000 a year! The consternation of all parties, but especially of countess, conveyancer, and solicitor, may be imagined; and two suits[1] were forthwith instituted before the then Vice-Chancellor, Sir John Leach, — one by the new earl, for the execution of the trusts as they actually appeared on the face of the will; and the other by the dowager countess, praying that the mistaken omission of her life-estate in the Gloucester estate might be rectified, and that the trust might be executed as so rectified. The Vice-Chancellor refused to admit the tendered evidence of that mistake, though, on a rehearing, it was shown by the distinguished conveyancer himself how the purely clerical error had been committed:[2] and his refusal was sustained by the unanimous opinion, delivered by the late Lord Tenterden, of the judges summoned to assist the House of Lords; which decided in conformity with that view, on a thoroughly established principle as to the non-admissibility of such evidence for such a purpose. It would render all written wills and instruments worthless; opening the door to those endless frauds and

[1] The Earl of Newburgh *v.* Countess Dowager of Newburgh, 5 Madd. 364.

[2] 5 Madd. 367.

perjuries which it had been one great object of the Statute of Frauds to prevent. "To assume such a jurisdiction," said the court, "would be to repeal the Statute of Frauds in all cases of failure, by mistake or accident, to comply with it. To admit parol evidence, under such circumstances, of the devisor's *intention*, it was the very object of the statute to prevent."[1]

*

IN Stokes *v.* Heron[2] the decision turned upon the rule in Wild's Case, 6 Coke's Reports, 166. Sir Edward Sugden considered that Lord Plunket misapprehended the nature of this rule. Lord Brougham, in delivering his opinion in the House of Lords, said: "Lord Plunket was perfectly accurate, as accurate as it was possible to be, in his reference to the case; Sir Edward Sugden thought him wrong, probably by looking to the margin instead of the case." Sir Edward Sugden, in reference to this observation, says: "The learned Lord Brougham actually confounded

[1] Miller *v.* Travers, 8 Bing. 254. This was a case of an error precisely similar to that mentioned in the text, and was attended with the like disastrous results. A testator executed a will, under the impression that it contained a devise of, amongst others, "his estates in the *county of Clare*," in accordance with his instructions, and with the draught of the will, which had been sent to a conveyancer, to make certain alterations not affecting the estates in question. By an unfortunate and undetected mistake, he had erased the critical words, "county of Clare", the will, as executed, consequently omitted them; and parol proof of these facts was rejected, on the principle stated in the text.

[2] 12 Clark & Finnelly, 161.

the *decision* in Wild's Case with the *resolution*, which was probably a dictum invented by Lord Coke himself"; and adds, "The only edition of Coke's Reports that Sir Edward Sugden ever had is one in which there are no marginal notes."

⁂

ONE of the most remarkable instances on record where the degree of impunity to which counsel are entitled in the exercise of their profession came in question, occurred in the trial of John Cook, one of the regicides. He had acted as solicitor-general for the Commonwealth during that solemn mockery of justice when John Bradshaw, serjeant-at-law, sat as judge upon his king; and in that capacity he had prayed that speedy judgment might be pronounced against Charles I., whom he styled "the prisoner at the bar." When tried for high treason, he adroitly attempted to excuse himself on the ground that he had no participation in the king's death,—not having formed part of the court which condemned him, and having merely discharged, *for his fee*, the duty of a counsel. And to get rid of the objection that he had demanded the judgment of the court which tried the king, he had recourse to the quibble, that his words ought to be taken in mitiore sensu, and that it should be presumed that perhaps he meant a judgment of acquittal! This is his argument: "My Lord, when judgment is demanded, is it not twofold, of acquittal

or condemnation? If those that then were intrusted with the power of judicature, if they did not know any law to proceed by to take away his Majesty, then I demanding their judgment, it doth not appear to be my judgment; and I refer it to the learned counsel, that counsel many times at the assizes and other courts have been sorry that the verdict has been given for their clients, when they have known the right lay on the other side, and so I might in this."[1] And with reference to his acts being only those of an advocate, and therefore innocent, he said: "My Lord, I humbly answer this, to that which seems to be the most material part in the indictment, that we did assume a power; my Lords, I did not assume a power. I hope it will not be said that the counsel had any power: eloquentia in the counsel, judicium in the judges, and veritas in the witnesses, 25th of Acts, Tertullus, that eloquent orator, accused Paul; Paul answered for himself, and it is said, 'Festus being willing to do the Jews a courtesy, he left Paul bound'; it was not the counsel that left him bound: his Majesty was never a prisoner to me, and I never laid my hands upon him; if any witnesses have spoken of any irreverence, I must appeal to God in that I did not in the least manner carry myself undutifully to his Majesty, though one of the witnesses was pleased to say that I said these words, 'That there is a charge against the prisoner at the bar'; it was not

[1] 5 Howell State Trials, 1094.

said the 'prisoner at the bar'; there was not one disrespective word from me. There is a case in the Third Institute of my Lord Coke: it is to this purpose, that one wilfully and knowingly forswore himself: the case was put to inveigle the court; and though the court does injustice upon a false oath, it is not injustice at all in the witness, it is perjury in him; if there can be no injustice in a witness, much less a counsellor can be said to have his hand in the death of any, because he has no power at all. This must needs follow, that if it shall be conceived to be treason for a counsellor to plead against his Majesty, then it will be felony to plead against any man that is condemned unjustly for felony. The counsellor is to make the best of his client's cause, then to leave it to the court."[1] And again, "I must leave it to your consciences, whether you believe that I had an hand in the king's death, when I did write but only that which others did dictate to me, and when I spoke only for my fee."[2]

Sir Orlando Bridgman, however, the Lord Chief Baron, in summing up the case to the jury, disposed of this ingenious defence by thus addressing the prisoner: "Counsel cannot be heard against the King; you undertake to be counsel against the King in his own person and in the highest crime; if the counsel at the bar in behalf of his client should speak treason, he went beyond his sphere; but you did not only speak (but acted) treason. You said

[1] 5 Howell State Trials, 1093. [2] 5 Howell State Trials, 1098.

you used not disrespective words to the King; truly, for that you hear what the witnesses have said: you pressed upon him; you called it a delay; you termed him not the king, but the prisoner at the bar, at every word. You say you did not assume an authority; it is an assumption of authority if you countenance or allow of their authority." [1]

Cook was found guilty, and when brought up for judgment he made a last desperate effort to get off by the same plea. Being asked what he had to say why the court should not pronounce judgment upon him to die, according to law, he urged two objections to the indictment, which were overruled, and he then said, "I say it was professionally."

Lord Chief Baron: "That hath been overruled already; we have delivered our opinions; the profession of a lawyer will not excuse them or any of them from treason, and this hath been overruled, and is overruled again."

So Cook suffered the death of a traitor, and was hanged.

※

AT the common law moderate chastisement of a servant might be justified; and to an action of assault, battery, and false imprisonment, it was a good plea "that the plaintiff, being a lunatic, the defendant arrested him, confined him, *and whipped him.*" [2]

[1] 5 Howell State Trials, 1110.

[2] Lord Campbell Lives of the Chancellors, Vol. VI. p. 39 note.

IN the case of Norton *v.* Relly,[1] a bill was filed by a maiden lady residing at Leeds, against a Methodist preacher and others, trustees named in a deed of gift executed by her to him, — suggesting that it had been obtained by undue means, — and praying that it might be delivered up to be cancelled. He had introduced himself to her notice by a letter, in which he said, that, "although unknown to her in the flesh, from the report he had of her he made bold to address her as a fellow-member of that consecrated body wherein the fulness of the Godhead dwelt, and that he was coming among them at Leeds, for a little time, to preach the kingdom of God," subscribing himself "her affectionate brother in the flesh." She was prevailed upon to invite him to her house, to accompany him to London, to give him large sums of ready money, and to grant him an annuity charged on her real estates in Yorkshire.

LORD CHANCELLOR HENLEY. — This cause, as it has been very truly observed, is the first of the kind that ever came before the court, and, I may add, before any court of judicature in this kingdom. Matters of religion are happily very rarely the subject of dispute in courts of law or equity. [After expressing his respect for dissenters, he proceeds:] But very wide is the difference between dissenters and fanatics, whose canting and whose doctrines have no other tendency than to plunge their deluded

[1] 2 Eden, 286.

votaries into the very abyss of bigotry, despair, and enthusiasm. And though even against those unhappy and false pastors I would not wish the spirit of persecution to go forth, yet are not these men to be discountenanced and discouraged whenever they are properly brought before courts of justice? — men who, in the Apostle's language, *go about and creep into people's dwellings, deluding weak women,* — men who go about and diffuse their rant and warm enthusiastic notions, to the destruction not only of the temporal concerns of many of the subjects of this realm, but to the endangering their eternal welfare. And shall it be said that this court cannot relieve against the glaring impositions of these men? that it cannot relieve the weak and unwary, especially when the impositions are exercised on those of the weaker sex? This court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree. Here is a man, nobody knows who or what he is; his own counsel have taken much pains modestly to tell me what he is not, and depositions have been read to show that he is not a Methodist. What is that to me? But I could easily have told them what, by the proofs in this cause and his own letters, he appears to be, — a subtle sectary, who preys upon his deluded hearers, and robs them under the mask of religion. Shall it be said, in his excuse, that this lady was as great an enthusiast as himself? It is true that she

was far gone, — but not far enough for his purpose. Thus he addressed her, "*Your former pastor has, I hear, excommunicated you, but put yourself in my congregation, wherein dwells the fulness of God.*" How scandalous, how blasphemous, is this! In coming from London to Leeds he will not come in a stage-coach, but must have a post-chaise, and live elegantly on the road at the expense of the plaintiff, who gave him £ 50 in money, besides presents of liquor, so that his own hot imagination was further heated with the spirit of brandy. He secured a part of her fortune by lighting up in her breast the flame of enthusiasm, and undoubtedly he hoped in due time to secure the whole by kindling another flame of which the female breast is so susceptible; for the invariable style of his letters is "*all is to be completed by love and union.*" Let it not be told in the streets of London that this preaching sectary is only defending his just rights. I repeat, let not such men be persecuted, but many of them deserve to be represented in puppet-shows. I have considered this cause not merely as a private matter, but of public concernment and utility. Bigotry and enthusiasm have spread their baneful influence amongst us far and wide, and the unhappy objects of the contagion almost daily increase. Of this, not only Bedlam, but most of the private madhouses, are melancholy and striking proofs. Let it be decreed that the defendant execute a release to the plaintiff of this annuity, and

deliver up the deed for securing it. I cannot conclude without observing that one of his counsel, with some ingenuity, tried to shelter him under the denomination of "*an independent preacher.*" I have tried in this decree to spoil his "*independency.*"

⁂

LORD COKE, in the Fourth Institute, draws a parallel between a useful member of Parliament — one possessed of all "properties a parliament man should have" — and the Solomon of the bestial world, to wit, the elephant. "Every member of the House," he says, "being a counsellor, should have three properties of the elephant: first, that he hath no gall; secondly, that he is inflexible, and cannot bow; thirdly, that he is of a most ripe and perfect memory. . . . . We will add two other properties of the elephant, — the one, that though they be Maximæ virtutis et maximi intellectus, of greatest strength and understanding, tamen gregatim semper incedunt, yet they are sociable, and go in companies. Sociable creatures that go in flocks or herds are not hurtful as deer, sheep etc., but beasts that walk solely or singularly, as bears, foxes etc., are dangerous and hurtful. The other, that the elephant is Philanthropos, homini erranti viam ostendit (a philanthropist, who showed the wanderer his road) and these properties ought every parliament man to have."

"BROTHER of Winchester," said Cranmer to Lord Chancellor Gardyner, "you like not anything new, unless you be yourself the author thereof." "Your Grace wrongeth me," replied the inveterate Conservative. "I have never been author yet of any one new thing; for which I thank my God."[1] "Such a conservatism," says Sumner,[2] "is the bigotry of science, of literature, of jurisprudence, of religion, of politics. An example will exhibit its character.

"When Sir Samuel Romilly proposed to abolish the punishment of death for stealing a pocket-handkerchief, the Commons of England consulted certain officials of the law, who assured the House that such an innovation would endanger the whole criminal law of the realm. And when afterwards this illustrious reformer and model lawyer (for, of all men in the history of the English law, Romilly was most truly the model lawyer) proposed to abolish the obscene punishment for high treason, requiring the offender to be drawn and quartered, and his bowels to be thrown into his face, while his body yet palpitates with life,[3]

1 Lord Campbell Lives of the Lord Chancellors, Vol. II. p. 181, 5th ed.

2 Works, Vol. II. p. 127.

3 Lord Coke, in detailing this barbarous punishment, finds authority for each cruelty in the Bible. The "drawing" is justified by 1 Kings ii. 28; the "hanging" by Esther ii. 23. The "embowelling" is sanctioned by the circumstances attending the fate of Judas, Acts i. 18. For the extraction of the criminal's heart, he finds authority in 2 Samuel xviii. 14, 15. The "beheading" he holds justified by 2 Samuel xx. 22. And he cites 2 Samuel iv. 11, 12, as authorizing the practice of hanging up the traitor's disjointed body after execution. Psalm cix., in his opinion, sanctions the law of corruption of blood in such cases. 3 Inst. 211.

the Attorney-General of the day, in opposing this humane amendment, asked, 'Are the safeguards, the ancient landmarks, the bulwarks, of the Constitution to be thus hastily removed?' Which gave occasion for the appropriate exclamation in reply, 'What! to throw the bowels of an offender into his face one of the safeguards of the British Constitution! I ought to confess that until this night I was wholly ignorant of this bulwark.'"

*

IN the Case of Swans,[1] it is held that cygnets belong equally to the owner of the male and the owner of the female swan; and this is the reason of the law: "The law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls, — for the cock swan holdeth himself to one female only, and for this cause nature has conferred on him a gift beyond all others; that is, to die so joyfully that he sings sweetly when he dies; upon which the poet saith: —

> Dulcia defecta modulatur carmina lingua
> Cantator, cygnus, funeris ipse sui etc."

*

LORD LYNDHURST was in his early days a *reporter*. His name, however, appeared only on one solitary blue cover of Taunton's Reports.

[1] 7 Rep. 156.

"IF Acts of Parliament were, after the old fashion, penned by such only as knew what the common law was before the making of any Act of Parliament concerning that matter, as also how far forth former statutes had provided remedies for former mischiefs and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace by construction of law between insensible and disagreeing words, sentences, and provisos as they now do.[1]"

⁂

WITH reference to the manner in which the Year-Books were reported, it is to be observed that the whole cause, as well the special pleadings as the debates of the law thereupon, were transacted or alleged at the bar; and the prothonotaries, ex-officio, afterwards made up the records in Latin. *And the court often condescended to discourse with the serjeants about the discretion of their pleas, and the consequences, with respect to their clients. And the court did all they could to prevent errors and oversights.*

⁂

COMPARE Elliott *v.* Stone, 12 Cush. 174, with Elliott *v.* Stone, 1 Gray, 571.

[1] Preface to 2 Rep. pp. ix, x.

ON a previous page[1] a case is stated from Croke's Reports in the time of Elizabeth. In Camden's "Rémains,"[2] the sentence, and the performance of it, is given: "A poor man found a priest over-familiar with his wife, and because he spake it abroad, and could not prove it, his priest sued him before the Bishop's Official for defamation, where the poor man, in pain of cursing, was commanded, that in the parish church he should upon the Sunday, at high mass, stand up and say, 'Mouth, thou liest': whereupon, for fulfilling of his penance, up was the poor soul set in a pew, that the people might wonder at him and hear what he said; and there all aloud, when he had rehearsed what he had reported of the priest, then he set his hands on his mouth, and said, 'Mouth, thou liest': and by and by thereupon, he set his hands upon both his eyes, and said: 'But eyes,' quoth he, 'by the mass ye lie not a whit.'"

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NELSON'S LUTWYCHE. We give two specimens of the style in which these valuable reports were edited.

"This is only a hearsay report, which the Sergeant had ex relatione of his brother Girdler, which, for aught I know, may be as good authority as Justice Warburton's old manuscript; only I must observe, that, if I tell a long and impertinent story what

[1] Ante, p. 12. [2] Page 804, ed. 1870.

another man told me, it will not be allowed as evidence to a common jury, but it may serve to prolong the time, and so may this to enlarge the book."

"The Sergeant tells us, This case is reported by Sir J. Savile, and that the record was now printed to correct a mistake in that report, where 't is said there were two disturbances alleged etc. but certainly this could not be any reason for publishing this record, for after one hundred and fifteen years, when this case happened, it cannot be material to inform the world that there was but one disturbance set forth in that declaration; there must be some other reason for it, and probably it was to acquaint the reader (to use the common expression) how long the Lutwyches have followed the law; for I found John Lutwyche was attorney on the record for the defendants, and so he was in 9 Jac. Winch's Entries, fol. 9."

⁂

THE LORD STURTON AND LORD MORDANT.

THEY were brought to the bar now, being held for a contempt to the King for not coming to the Parliament by prorogation 5th November when the Gunpowder Treason was intended. And it was grandly suspected that they knew of the plot, because they were papists, and their excuses very frivolous. And Sturton was fined to six thousand marks, and Mordant to one thousand marks.[1]

[1] Noy, 102.

IN 32 Eliz. Reginæ, "Jane" was agreed, by the Court of King's Bench, to be all one with "Joan."

In "Lib. Assis." 26, fol. 7, "Julian" and "Gilian" are made two distinct names; "I doubt not but upon some good ground," says Brooke.

"Some will have the name 'Mabel' to be a contraction of the Italians from Mabella, that is, My fair daughter, or maid. But whereas it is written in deeds Amabilia and Mabilia, I think it cometh from Amabilis, that is, Loveable, or Lovely, and that the names are the same."[1]

⁂

THE defendant spoke these scandalous words of the plaintiff: "He hath got M N. with child." Motion to arrest the judgment for this that these words are not actionable. But per Glyn Chief Justice: The words are actionable because it does not lie in the mouth of the defendant to say that the plaintiff and M. N. were husband and wife.[2]

⁂

SHOWER, after reporting a long argument of his own, says, "At which Dolbin Justice was angry, and said no man would have made such a motion but myself, and wondered that I should have made such a motion."[3]

[1] 2 Roll. Ab. 135.
[2] 2 Siderfin, 17.
[3] Clerk *v.* Andrews, 1 Shower, p. 12.

"WHEN I was a nisi prius reporter," says Lord Campbell, "I had a drawer marked 'Bad Law' into which I threw all the cases which seemed to me improperly ruled. I was flattered to hear Sir James Mansfield C. J. say, 'Whoever reads Campbell's Reports must be astonished to find how uniformly Lord Ellenborough's decisions were right.' My rejected cases, which I had kept as a curiosity, — not maliciously, — were all burnt in the great fire in the Temple when I was Attorney-General." [1]

※

IN October 1660, Chief Baron Bridgman presided at the trial of the regicides. We find handed down to us some of the flowers of his eloquence, in charging the grand jury on this occasion. Having explained to them that the treason consisted "in *imagining* and *compassing* the King's death," and stated that the prisoners had gone farther, and "*executed* him on a scaffold in front of his own palace," he said: "Certainly this is so much beyond the imagination and compassing, as it is not only laying the cockatrice's egg, but brooding upon it till it hath brought forth a serpent." After stating that the crown of England is an imperial crown, he asks, "What is an imperial crown? It is that which, as to the coercive part, is subject to no man under God. The King of Poland has a crown; but what is it?

[1] Lives of the Chancellors, Vol. V. p. 376 note, 5th ed.

At his coronation he is conditioned with the people, that if he shall not govern them according to such and such rules, they shall be freed from their homage and allegiance; but the crown of England is, and always was, an imperial crown, — not subject to any human tribunal or judicature whatever. As to the person of the King, he is not to be touched. Touch not mine anointed. It is true (blessed be God!) we have as great liberties as any people have in Christendom, but let us owe them where they are due; we have them by the concession of our Princes. Our Princes have granted them, and the King now grants them." Having stirred up their indignation by a rhetorical description of the King's death, he thus concludes: "No story that ever was — I do not think that any romance — any fabulous tragedy — can produce the like. You are now to inquire of blood — of royal blood — of sacred blood — blood like that of the saints under the altar, crying, Quousque, Domine. This blood cries for vengeance; and it will not be appeased without a bloody sacrifice. He that conceals the guilt of blood takes it upon himself, — wilfully, knowingly takes it upon himself; and we know that when the Jews said, Let his blood be on us and our seed, it continued and continues to bring a curse unto them and their posterity to this day."[1]

We should think it rather strange if a judge were to tell the jury that a capital charge was so clearly

[1] 5 Howell State Trials, 989 - 994.

proved that they ought to find a verdict of *guilty* without leaving their seats; but even fair judges were not so squeamish in those days, and the case was made out in law, and, in fact, beyond all possibility of doubt. He checked the applause which burst out at the verdict, stating that it was more fitting for a stage play than a court of justice.[1]

⁂

SWINBURNE mentions a bequest of a legacy to a person, on condition of his drinking up all the water in the sea; and it was held, that, as this condition could not be performed, it was void.[2] The condition to go to Rome in a day, which Blackstone mentions in his Commentaries as void, as impossible to be performed, may be good, since railroads are introduced on the Continent.

⁂

AN adulterer takes away another man's wife, and puts her in new clothes: the husband may take the wife with her clothes; for it is as it were a gift of the said apparel unto her. Besides, the more worthy thing draws to it things of less worthiness.[3] Quære which is the more worthy, — the wife or the "new clothes"?

[1] 5 Howell State Trials, 1024, 1208. Lord Campbell Lives of the Chancellors, Vol. IV. pp. 142, 143, 5th ed.

[2] Part 4, sec. 6, art. 2.

[3] Finch's Law, 22, 23.

ALL crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of that error if another particular ensue of as high a nature.

Therefore if an impoisoned apple be laid in a place to poison I. S., and I. D. cometh by chance and eateth it, this is murder in the principal that is actor; and yet the malice in individuo was not against I. D.

So if a thief find the door open, and come in the night and rob a house, and be taken with the manner, and break a door to escape, this is burglary; yet the breaking of the door was without any felonious intent; but it is one entire act.

So if a caliver be discharged with a murderous intent at I. S. and the piece break and strike into the eye of him that dischargeth it and killeth him, he is felo de se; and yet his intention was not to hurt himself, for felonia de se and murder are crimina paris gradus. For if a man persuade another to kill himself, and be present when he doth so, he is a murderer.

But when a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstance not pursued.

If a man command I. S. to rob I. D. on Shooters Hill, and he doth it on Gads Hill; or to rob him such

a day, and he doth it the next day; or to kill I. D. and he doth it not himself but procureth I. B. to do it; or to kill him by poison, and he doth it by violence; — in all these cases, notwithstanding the fact be not executed in circumstance, yet he is accessory nevertheless.

But if it be to kill I. S. and he killeth I. D., mistaking him for I. S., then the acts are distinct in substance, and he is not accessory.

And be it that the acts be of differing degrees, and yet of a kind; as if a man bid I. S. to pilfer away such a thing out of a house, and precisely restrain him to do it some time when he is gotten in without breaking of the house, and yet he breaketh the house; yet he is accessory to the burglary: for a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands.

But if a man bid one rob I. S. as he goeth to Sturbridge Fair, and he rob him in his house, the variance seemeth to be of substance, and he is not accessory.[1]

⁂

BRACTON, describing the judges of his time, speaks the language likely to come from a disappointed practitioner: he calls them "Incipientes et minus docti, qui cathedram judicandi ascendunt antequam leges dedicerint."

[1] Bacon Maxims, Reg. XV., XVI., citing Plowden, 474, 475.

IT is actionable to call a counsellor "a daffodowndilly," if there be an averment that the words signify an ambidexter;[1] or to say of an attorney, that "he hath no more law than Master Cheyny's bull," even although Master Cheyny actually have no bull; for if that be the case, as Keeling Chief Justice observed, "the scandal is the greater."[2] And it is quite clear that to say that a lawyer has "no more law than a goose" is actionable; and the reporter adds a quære, whether it be not actionable to say a lawyer "hath no more law than the man in the moon"![3]

⁂

A says to B, "One of us is perjured." B. says to A, "It is not I." And A. says, "I am sure it is not I." B. shall have an action for these words, for the subsequent words show apparently that he intends him.[4]

⁂

SIR JOHN FINEUX, some time Chief Justice of the King's Bench, was often heard to say, "Whoso taketh from a justice the order of his discretion, taketh surely from him more than half his office."[5]

[1] 1 Roll. Ab. 55. pl. 17.
[2] 1 Siderfin, 327. 2 Keble, 202.
[3] 1 Siderfin, 424.
[4] Coe *v.* Chambers, 1 Roll. Ab. 75.
[5] Camden's "Remains," p. 307, ed. 1870.

CUNNINGHAM writes of the "many reports which have been published," that "some of them, as Justice Shelley said, might be compared to Banbury cheeses, whose superfluities being pared away, there would not be enough left to bait what Lord Hale called 'the mousetrap of the law'; yet probably the meanest of them may, like the little birds, add something towards building the eagle's nest." [1]

⁂

IN the perusal of a very solid book on ecclesiastical law, including the progress of the ecclesiastical differences in Ireland, written by a native of that country, after a good deal of tedious and vexatious matter, the reader's complacency is restored by an artless statement how an eminent person "abandoned the errors of the Church of Rome, and adopted those of the Church of England."

⁂

"BUT particularly," says Sheppard, "if an idiot have so much knowledge that he can read or learn to read by instruction and information of others, or can measure an ell of cloth, or name the days of the week, or beget a child, son or daughter, or such like, whereby it may appear that he has some light of reason, then he is no idiot naturally." [2]

[1] Cunningham, Preface, p. ix, A. D. 1766.
[2] Sheppard Gr. Ab. tit. Idiot.

IT is established that a subsequent will made under the impulse of a mistaken notion of a fact, and referring to the fact as having actually happened, and as being the foundation of the present testamentary act, will not revoke a former will;[1] according to the case, Pater credens filium suum esse mortuum, alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla.[2]

⁂

IT was a question whether a rape could be committed on the body of a child of the age of six or seven years; and a person being indicted for the rape of a girl of seven years old, although he was found guilty, the court doubted whether a child of that age could be ravished; and it was said, if she had been nine years old she might, *for at that age she may be endowed.*[3]

⁂

THE only judicial opinion of Lord Fortescue which ever made a deep impression on the American side of the Atlantic is one involving the difficult question of domicile, and is thus reported:—

"A man's bed stood so that he lodged in two parishes at once. The question was where his settlement should be. Mr. Justice Fortescue said, where his head lay; as being the more noble part."

[1] Campbell *v.* French, 3 Ves. 321.

[2] Cicero De Oratore, lib. I. ch. 38, quoted in 1 Saund. 280 d, 6th ed.

[3] Dyer, 304.

BOYDELL'S Illustrations of Shakespeare. This work was the subject of litigation in the celebrated case of Boydell *v.* Drummond.[1] This is a leading case and familiar to the profession. To our non-professional readers, at least to those who own the volumes, a brief statement may be interesting. The Statute of Frauds enacts that no action shall be brought upon "any agreement that is not to be performed within the space of one year from the making thereof," unless there is some note or memorandum in writing, signed by the party to be charged. In this case the plaintiff proposed to publish a magnificent edition of Shakespeare, illustrated by seventy-two engravings, which were to come out in numbers, at three guineas per number, two of which were to be paid for in advance; each number was to contain four engravings; "*one number at least was to be published annually,* and the proprietors were confident that they should be able to produce two numbers *in the course of every year.*" These proposals were printed in a *prospectus,* and lay in the plaintiff's shop. The plaintiff also kept a book, which had for its title, "Shakespeare subscribers, their signatures"; but did not refer to the *prospectus.* The defendant, determining to become a subscriber to the work, signed his name in the book containing the list of subscribers, but afterwards refused to take it; though he had received and paid for some few numbers, this action

[1] 11 East, 142, A. D. 1809.

was brought to compel him to complete his contract. The court decided that the agreement was not to be performed within the space of a year from the making thereof; that it was therefore within the Statute.

⁂

ROYAL proclamations were guarded, even from imitation, with great jealousy, by the Star-Chamber. In the twenty-second year of the reign of Henry VIII., a knight, happening to be an executor, caused *notice* to be published in several towns, that all persons to whom his testator was indebted, coming to him, should be paid. For this offence he was fined, and committed to the Fleet.

⁂

The first American Law Reports.

KIRBY'S REPORTS was published in 1789.[1] The Preface is not dated. The Preface to Hopkinson's Reports is dated February 1789. The volume is scarce. The full title is: "Judgements in the Admiralty of Pennsylvania, in Four Suits brought as for Maritime Hypothecations. Also, the Case of Silas Talbot against the Brigs Achilles, Patty, and Hibernia, and of the Owners of the Hibernia against their Captain, John Angus. With an Appendix containing the testimony exhibited in the Admiralty in those Causes. The Hon. Francis Hopkinson, Judge. Phila-

[1] See the Preface to the first volume of Connecticut Reports, p. xxviii.

delphia: Printed by T. Dobson and T. Lang in Second Street. MDCCLXXXIX." 8vo. pp. 131."

⁂

IN Hale's Pleas of the Crown it is laid down that the corpus delicti must be expressly proved in criminal cases. In a recent crown case reserved,[1] it was argued, on the authority of this passage, that the corpus delicti must be proved in every criminal case, and that there was no difference in the application of the rule. But it was thus answered by that acute judge, Mr. Justice Maule: "If a man go into the London Docks sober without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine was missed."

⁂

WILBUR *v.* HUBBARD.[2] This was an action brought to recover damages for the defendant's dog killing and wounding the plaintiff's sheep. By the court, Balcom P. J.: "The most material question in this case is whether the defendant's dog was one of the two that wounded and killed the plaintiff's sheep. The sheep were wounded and killed in the night of the 8th of August 1860; and

[1] Regina *v.* Burton, Dearsly C. C. 282. [2] 35 Barb. 303.

there is some evidence that the defendant's dog was not at home that night, and that it was a 'sheep-killing dog.' Some of the witnesses said the defendant's dog had a 'very coarse voice'; that they could identify it by its bark, and heard the barking of a dog in the lot where the sheep were the night they were wounded and killed, which they thought was that of the defendant's dog. But none of them saw the dog that night in such lot. I think it possible for persons to identify a dog by merely hearing it bark, without seeing it. Some persons have such peculiar voices they can be identified by acquaintances who hear them talk, without seeing them; and it seems reasonable that some dogs may bark in such a manner and have such singular voices that they can be identified in the night time, by persons who know them well, by merely hearing them bark, without seeing them."

※

IN the reign of Charles II., Walcot was executed for the Rye House Plot; and twelve years after his execution a writ of error was brought, and his attainder reversed, because in the record of his sentence it had not been stated that his entrails should be burnt *while he was alive.*

A prisoner was convicted of a capital felony and was sentenced to be punished by transportation. On error the judgment was reversed because he was not sentenced to be hanged, and he was discharged.

FENN, who was a brewer, brought an action against Dixe for saying to some of his customers, "I will give my mare a peck of malt and lead her to the water, and let her drink, and she shall p—s as good beer as any as Tom Fenn brews." Rolle argued that the words are actionable; and he said that it had been adjudged here, that if one say of a brewer that he brews naughty beer, without more saying, these words are actionable, without any special damage alleged. But the whole court was against him (Croke only absent) that the words of themselves were not actionable, without any special damage alleged. And Berkeley said that the words are only comparative, and altogether impossible also. And he said that it had been adjudged that where one says of a lawyer, that he had as much law as a monkey, that the words were not actionable, because he hath as much law and more also. But if he had said that he hath no more law than a monkey, those words were actionable. And it was adjourned.

⁂

THE first misprision of treason created by the Succession Act passed in the reign of King Henry VIII. is made to consist in *words*, without writing, or exterior act or deed, whereby anything is published, divulged, or uttered to the peril of the King, slander or prejudice of the marriage with Anne

[1] March, pl. 93. 1 Roll. Ab. 58. Sir W. Jones, 444.

Boleyn, or the slander or disinherison of the royal issue. The clause on this subject affords an illustration how, by judicial interpretation, a minor offence may have its complexion darkened.

Two monks named Hale and Feron were convicted in the year 1535 of treason, on account of a *conversation* which they were said to have had together, when walking "to and fro." The indictment alleged what Hale *said* to Feron. Nevertheless this "slander of the King's marriage" was only in *words*, and these were not made treason until a statute in the twenty-sixth year of the King. In order to remove this difficulty, it was alleged, in the indictment, that Hale *spoke* the words with a view of exciting Feron to *write* against the King, who subsequently wrote down in Latin the words which Hale had spoken in English. Here then, it was construed, there was a slander of the King's marriage in *writing*, and that *words* might interpretatively become *writings*, although in a different language, and according to another man's version.

⁂

AT one time there were at the bar of the Court of Chancery particular barristers who acquired reputation by their cunning in drawing bills. One of these being found *too subtle*, an order was made by Lord Keeper Egerton that no bills signed by him should be put upon the file.[1]

[1] Cary, 38.

A CURIOUS case came before Lord Chancellor King showing that towards the middle of the last century the custom of marrying infants of tender years, which had formerly been very common, still prevailed in England. One of several guardians to an heiress took her from a boarding-school when she was only nine years old, and married her to his own son, who had no estate. The Lord Chancellor, on motion, ordered this guardian to bring into court the infant whom he had married to his son, and that he, the son, and the infant should attend. All attending, the counsel for the application pleaded, "that this guardian having, in so perfidious a manner, broken his trust, and married his ward to his own son, who was worth nothing, the Court of Chancery, the guardian of all infants with the superintendency and cognizance of all trusts, ought to commit him, and not suffer the girl, now but nine years old, to continue to cohabit with her husband, who ought not to be indulged with opportunities of inveigling her, and preventing her from disagreeing to the marriage when she should come to the age of twelve years, which it would be for her interest to do."

LORD CHANCELLOR. — The infant girl never having been under the care of the court, nor committed by the court to the care of this guardian, I do not think he can be considered guilty of a contempt of court; but then it is a very ill thing in him to marry this child to his own son, and he is punishable by an in-

formation. I will therefore have him bound over with sureties to appear to answer an information to be filed against him by the Attorney-General. As for the child, let her be handed over by this knavish guardian to the other guardian named in her father's will, who, it is to be hoped, will take proper care of her and do what is for her advantage in advising her to confirm or to renounce the marriage.[1]

※

IN Rastell's Entries, 26, there is an amusing precedent of a declaration in an action on the case against a barber for shaving the beard "inartificially": 'R. S. nuper de N. attach. fuit ad respondendum H. B. de placito, quod cum idem R. ad barbam ipsius H. bene et artificialiter cum novacula munda et salubri radere apud N. assumpsisset, predictus R. barbam ipsius H. cum quadam novacula immundi et insalubri tam negligenter et inartificialiter rasit, quod facies ipsius H. morbosa et scabiosa devenit ad damnum ipsius H. 40*s.* ut dicitur."

※

KELYNG reports a case in which the question was, whether a pardon for murder could be pleaded to a conviction for manslaughter. It was ultimately allowed.

[1] Goodall *v.* Harris, 2 P. Wms. 561.

SIR SAMUEL ROMILLY designates the Act of Elizabeth concerning Egyptians as "the most barbarous statute that ever disgraced our Criminal Code." It was enacted that "all persons above the age of fourteen years, that shall be found in the company of vagabonds commonly called or calling themselves Egyptians,[1] or counterfeiting or disguising themselves, by their apparel, speech, or behaviour, like them, although they are persons born within the king's dominions, if they continue one month, are felons and ousted of clergy." Sir Matthew Hale's only observation upon these statutes should be noticed: "I have not known these statutes *much* put in execution, *only* about twenty years since, at the Assizes at Bury, about thirteen were condemned and executed for this offence."[2]

⁂

LORD COKE has mentioned what he calls a "*flattering* preamble" of a Statute of Henry VII. every statement of which he endeavors to show was, to use his expression, ex diametro opposite to the enactments which it was made to preface. Such a preamble may be thought analogous to the metaphor applied by Butler to Sir Hudibras's courtship, of the sculler who looks one way and rows another.

[1] . . . . "That handkerchief
Did an *Egyptian* to my mother give." — *Othello*

[2] 1 Hale P. C. 670, 671.

SAUNDERS reports this case: "It was ruled by Hale Chief Justice, cæteris tacentibus, that a certain fault in a declaration was only matter of form and not matter of substance. Yet Saunders for the defendant urged that there were twenty books to prove it to be a matter of substance; which the Chief Justice confessed, but he said that the opinion had been otherwise for ten years past; *but I believe he meant his own opinion.*"[1]

*

LORD COKE, in his Third Institute, observes of the Statutes of Apparel, that many of them "fight with and *cuff* one another." Lord Herbert remarks that these laws for the government of fashion themselves *changed fashion.* It was not till the reign of James I. that Englishmen obtained liberty of apparel.

*

IF a carrier, to whom a package of goods is delivered to take to a certain place, open the package and take out *part* of the goods, it is larceny; yet it is not larceny if he take away the *whole* package.[2] Chief Justice Kelyng says, "I marvel at the case put 13 Edw. IV. 96, that if a carrier have a tun of wine delivered to him to carry to such a place, and he

[1] Slowe *v.* Wilmott, 2 Saund. 402.

[2] Commonwealth *v.* Brown, 4 Mass. 580.

never carry it, but sell it all, this is no felony; but if he draw part of it out, this is felony. I do not see why the disposing of the whole should not be felony also."[1] It has been observed that this construction "*savors* of contradiction" and "stands more on positive law than sound reasoning."

⁂

Mrs. Peele's Case.[2]

THIS was a suit against a certain Mrs. Peele, a sort of London Madame Le Brun of that day; the representative, in the English capital, of this lady, whose Parisian name and fame are handed down to legal immortality in one of the great English Peerage Cases, and who has left the bad repute of "*la veritable* Maison Le Brun," as Police Reports of 1860 assure us, to at least three hundred and twenty-eight houses of a special fame, sometimes called an ill one, in Paris, at this day. The Viscountess Purbecke,[3] famous for her beauty, and who so abused the dangerous gift as to become the scandal of St. James's Court, was at this time the occupant of Somerset House, then as now a princely establishment, built originally by the

[1] Kelyng, 83.

[2] Littleton, 150, 242.

[3] Her name was Frances Coke, and she was a daughter of Sir Edward of that name. Her mother was Lady Hatton—a Cecil—known in general history as a sister of Sir Thomas Burleigh, Earl of Essex, but better known to lawyers as the uncomfortable and imperious wife of the great Chief Justice, whose very name she refused to take, and whose life she tormented by every indignity that it was possible for a woman to offer to a husband.

Protector Somerset, long the abode of Queen Elizabeth, and, at the time we speak of, the resort of all that was "emancipated" in the world of courtly fashion. Like most beautiful women, however, while bringing troops of lovers daily to her feet, the Countess was herself the slave of one. This favored person was Sir Robert Howard, a younger son of the noble family of Suffolk. And, not too much to shock the *bienséances*, an arrangement was contrived to give the accepted lover what in France is known as *les petites entrées*, while the respectable world at large — including the lady's very virtuous, and, no doubt, very hopeful admirers — should enjoy in greater state and dignity *les grandes*. The virtuous Mrs. Peele was the common friend of Sir Robert and the lady; and, renting a handsome mansion next door to Somerset House, "a private passage," the reporter Littleton tells us, had been made between the two; so that, entering Mrs. Peele's street door, Sir Robert could find himself, without either scandal or difficulty, in the dressing-room of Lady Purbecke — and along with its less innocent attractions disclosing through the open lace-work of its half-drawn curtains and in its southern views the then sedgy banks of the Thames, the still lovely lawns of Lambeth, the ever-beauteous spires of Westminster, and the slope — in those days so graceful — of the Surrey Hills! Quid non vincit amor? How successfully it was all achieved! How delightfully they passed their time! Supping and

sinning so decorously, in all the charms of "love's beginning." But alas! the aliquid amari that springs up even in the fountain of our innocent delights! These very happy parties were not allowed to remain undisturbed; and notwithstanding the praiseworthy efforts they had made to avoid offending the over-good, Mrs. Peele was brought before the High Commissioners upon the discreditable charge of being "guilty of aiding, *causing*, and *procuring* adultery between the parties"; and, as it appears, from Littleton's report, found GUILTY, and IMPRISONED.

⁂

THERE is one instance in the reign of Elizabeth of a criminal jurisdiction being directly assumed by the Court of Chancery on a bill filed to punish a party for corrupt perjury, where there was not sufficient evidence to convict him at common law. He demurred, but was compelled to answer.[1]

⁂

TREMAIN'S CASE. Being an infant he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge. And the court sent a messenger to carry him from Oxford to Cambridge. And upon his returning to Oxford there went another, *tam* to carry him to Cambridge, *quam* to keep him there.[2]

[1] Cary, 90. [2] 1 Strange, 167.

LORD COKE in the Third Institute relates that many and common women had seated themselves in a lane, next to the house of the friars Carmelites in Fleet Street: this being an open and known wickedness, King Edward III., to the end that these friars might perform their vows, one of which was to live in perpetual chastity, took order for the removing of these women.[1]

⁂

THE following is the entire judgment of Mr. Justice Best in an important case: "If we were to grant this rule, we should make ourselves auditors to all the trading corporations in England."[2]

⁂

CHIEF JUSTICE KELYNG was unspeakably proud of the collar which he wore as Chief Justice, this alone distinguishing him externally from the puisnies, a class on whom he looked very haughtily. In his own report of the resolutions of the judges prior to the trial of Lord Morley for murder, before the House of Lords, he considers the following as the most important: "We did all, una voce, resolve that we were to attend at the trial in our scarlet robes, and the Chief Judges in their collars of S. S.,—

[1] 3 Inst. 205.

[2] The King *v.* Bank of England, 2 B. & Ald. p. 623. Quoted in American Railway Frog Co. *v.* Haven, 101 Mass. p. 407.

which I did accordingly."[1] His volume of decisions in criminal cases abounds with silly egotisms.

⁂

WE will conclude this volume with a single line from Lord Bacon:—

"Rather to excite your judgment briefly than to inform it tediously."[2]

[1] Kelyng, 53, 54. 6 Howell State Trials, 769.
[2] Articles of Union between England and Scotland.

THE END.

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